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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~291~~ 36

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE R. DUNCAN.

IN ERROR TO THE COURT OF COMMON PLEAS NO. 2, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

FILED JUNE 22, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 15, 1888.

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1 *Exemplification.*

STATE OF PENNSYLVANIA, }
Philadelphia County, } *sct:*

Among the records and proceedings of the court of common pleas No. 2, for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 72, of June term, 1881, to wit:

Docket Entries, June Term, 1881.

GEORGE R. DUNCAN
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } 72.

M. H. Todd, D. W. Sellers. See writ.

Sum's case. Exit June 6, 1881; ret. 1st Mon. July, 1881.
June 20, '84, pl'ff's bill of $249.25 filed. S. C. costs, $11.

Nov. 18, 1881, *narr.* and rule to plead filed.
Nov. 29, 1881, pleas filed.
Nov. 30, 1881, replication filed.
May 1, 1882, additional pleas filed.
May 31, 1882, replication and rule to rejoin filed.
June 3, 1882, rejoinder filed.
May 7, 1883, pleas filed, as per agreement.
Jan'y 14, 1884, jury called.
Jan'y 18, '84, V. for pl'ff, $20,000.
Jan'y 22, '84, motion & reasons for new trial on part of pl'ff.
Jan'y 23, '84, motion & reasons for new trial on part of def't.
Eo die, motion for judg't *non obstante veredicto.*
M'ch 6, '84, rule granted.
M'ch 15, '84, pl'ff's rule withdrawn.
2 June 12, '84, rule for new trial discharged.
Eo die, judg't for pl'ff on point reserved.
June 13, 1884, exceptions to judg't on points reserved.
June 16, '84, jury fee paid.
Eo die, judgment.
Nov. 17, 1884, writ of error from S. C. (of July, 1884, No. 109) bro't into office.
Dec. 31, 1884, bill of exceptions filed.
Eo die, record certified for S. C.
Feb'y 17, 1886, record returned & remittitur from S. C. filed certifying judgment affirmed.
Feb'y 23, 1886, certificate from S. C. filed certifying that the pl'ff in error has filed a petition for reargument.
March 25, 1886, certified copy of petition for writ of error to Supreme Court of United States filed.
Eo die, bond surwrit of error to U. S. Supreme Court filed.

Eo die, writ of error from U. S. Supreme Court brought into office.
Eo die, citation to defendant in error, surwrit of error to U. S. Supreme Court filed.
Eo die, proof of service thereof filed.
May 3, 1886, copy of docket entries, record, and opinion filed.
June 5, 1886, assignment of errors and prayer for reversal filed.

3 *Exemplification.*

STATE OF PENNSYLVANIA, } *sct:*
Philadelphia County, }

Among the records and proceedings of the court of common pleas No. 2, for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 72, June term, 1881, to wit:

Docket Entries, June Term, 1881.

GEORGE R. DUNCAN
vs. } 72.
THE PENNSYLVANIA RAILROAD COMPANY.

M. H. Todd, D. W. Sellers. See writ.

Sum's case. Exit June 6, 1881; ret. 1st Mon. July, 1881.
June 20, 1884, pl't'ff's bill of $249.25 filed.

Nov. 18, 1881, *narr.* and rule to plead filed.
Nov. 29, 1881, plea filed.
Nov. 30, 1881, replication filed.
May 1, 1882, additional pleas filed.
May 31, 1882, replication and rule to rejoin filed.
June 3, 1882, rejoinder filed.
May 7, 1883, pleas filed, as per agreement.
Jan'y 14, 1884, jury called.
Jan'y 18, '84, V. for pl'ff, $20,000.
Jan'y 22, '84, motion & reasons for new trial on part of pl'ff.
Jan'y 23, '84, motion & reasons for new trial on part of def't.
Eo die, motion for judg't *non obstante veredicto*.
M'ch 6, '84, rule granted.
M'ch 15, '84, pl'ff's rule withdrawn.
June 12, '84, rule for new trial discharged.
Eo die, judg't for pl'ff on point reserved.
4 June 13, 1884, exceptions to judg't on points reserved.
June 16, '84, jury fee paid.
Eo die, judgment.
Nov. 17, 1884, writ of error from S. C. (of July, 1884, No. 109) bro't into office.
Dec. 31, 1884, bill of exceptions filed.
Eo die, record certified for S. C.

Certified from the record Dec. 31, 1884.

EUGENE J. LINDSAY,
Pro Proth'y.

5 C. P. No. 2. June T., 1881.

GEORGE R. DUNCAN
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } No. —

Issue writ of summons, — case as above, ret'ble *sec. reg.*
M. HAMPTON TODD, *Pro Pl'ff.*

To Col. Wm. B. Mann, proth'y of com. pl's c't.

(Endorsed): 72. June term, 1881. C. P. No. 2. George R. Duncan *vs.* The Pennsylvania Railroad Company. Præcipe sum's case. Filed June 6, '81. Todd.

6 *Summons.*

COUNTY OF PHILADELPHIA, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the county of Philadelphia, Greeting:

We command you that you summon the Pennsylvania Railroad Company, late of your county, so that it be and appear before our judges, at Philadelphia, at our court of common pleas No. 2, for the county of Philadelphia, to be holden at Philadelphia, in and for said county of Philadelphia, the first Monday of July next, there to answer George R. Duncan of a plea of trespass on the case, etc.; and have you then there this writ.

Witness the Honorable J. I. Clark Hare, president of our said court, at Philadelphia, the sixth day of June, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] JAS. B. WEBB,
Pro Prothonotary.

7 [Endorsed]: 72. June term, 1881. Court of common pleas No. 2. George R. Duncan *vs.* The Pennsylvania Railroad Company. Summons case. Todd.

The prothonotary will enter my appearance for the defendant.
July 23, '81. DAVID W. SELLERS.

8 PHILADELPHIA CITY AND COUNTY, *ss:*

In the Court of Common Pleas No. 2, for the County of Philadelphia, of June Term, 1881. No. 72.

The Pennsylvania Railroad Company, late of the county aforesaid, was summoned to answer George R. Duncan, the plaintiff, of a plea of trespass on the case, &c.

Whereupon the said plaintiff, by M. Hampton Todd, Esq., his attorney, complains for that whereas the said plaintiff, on the first day

of June, A. D. 1881, at the city and county aforesaid, was and from thence hitherto hath been and still is lawfully possessed in his demesne as of fee of a certain lot or piece of ground and the buildings, wharves, and improvements thereon erected, situate, and abutting on the west side of Twenty-third street and north side of Filbert street, in the city and county aforesaid, and containing, to wit, in front on Twenty-third street two hundred and thirty-one feet and extending in depth of that width along the north side of Filbert street aforesaid, and abutting thereon, as aforesaid, four hundred feet, more or less, to low-water mark on the river Schuylkill, together with the wharf and riparian rights incident and appurtenant
9 thereto.

And the said plaintiff in fact saith that the said Twenty-third street and the said Filbert street, at the point aforesaid, are public highways of the said city of Philadelphia, duly laid out, graded, curbed, and paved, and that the said the river Schuylkill is a navigable water highway.

And the said plaintiff in fact further saith that the said defendant is a corporation duly incorporated under the laws of this Commonwealth, and, as such, is invested with the privilege of taking private property for public use.

And the said plaintiff in fact further saith that afterwards, to wit, on the day and year aforesaid, at the city and county aforesaid, the said defendant did, in the construction and enlargement of its works, highways, and improvements, erect, build, and construct along and upon Filbert street aforesaid and in front of the said premises of the said plaintiff abutting thereon as aforesaid an elevated railroad placed on iron and stone pillars set at the curb lines in Filbert street aforesaid at intervals longitudinally of fifty feet, more or less, and at an elevation of at least twenty feet above the established grade of Filbert street aforesaid; and the said plaintiff in fact further
10 saith that the said defendant did, on the day and year aforesaid, at the city and county aforesaid, erect, build, and construct and abutment for the sustaining of a bridge superstructure across the river Schuylkill aforesaid, on the eastern side of said river and in the middle of Filbert street aforesaid, in front of the premises of the said plaintiff as aforesaid, and did then and there erect and construct opposite Filbert street aforesaid in the channel of the said river Schuylkill two piers to further sustain and support the bridge superstructure aforesaid.

And the said plaintiff in fact further saith that the said bridge and the said elevated railroad form and make one continuous line of railway, which the said defendant operated and used and still doth operate and use for the purposes of the transportation of freight and passengers in railway cars driven and drawn by steam locomotives, to wit, at the city and county aforesaid.

And the said plaintiff further saith that the erection, building, and construction by the said defendant of the elevated railroad aforesaid at the place aforesaid and in the manner aforesaid,
11 and the erection and construction of the abutment and pier as aforesaid for the support of the bridge superstructure afore-

said, and the operation and use of the said elevated railroad for the transportation of freight and passengers in railway cars driven and drawn by steam locomotives, and the noise, burning cinders, smoke, dust, and dirt incident to the operation and use of an elevated railroad constructed as aforesaid for the purposes as aforesaid has injured and still doth injure the said plaintiff in the possession, use, and enjoyment of his premises and property aforesaid, and has rendered and still doth render the same incommodious, unfit, and of little or no use or value to the said plaintiff, and has depreciated the value of said premises, and has deprived him and still doth deprive him of the free use along and upon Filbert street as a highway as aforesaid, and has deprived him of four hundred feet of building front on Filbert street as aforesaid, and has deprived him of free access to and from the wharves on the Schuylkill front of his property as aforesaid, not only by the river, but also by Filbert street aforesaid, and has greatly depreciated the value of the said
12 wharves, so that they are no longer of any value to the said plaintiff; wherefore the said plaintiff saith that he hath been and still is disturbed and annoyed, injured and prejudiced, in the possession, use, occupation, and enjoyment of the said premises, with the appurtenances, and hindered and prevented from occupying and enjoying the same in so ample and beneficial a manner as he otherwise might have done, and other wrongs to the said plaintiff then and there done.

Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of one hundred thousand dollars, and therefore he brings his suit, &c.

2d count. Also for that whereas the said plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been and still is, lawfully possessed in his demesne as of fee of a certain messuage and premises, with the appurtenances, situate on the north side of Filbert street and extending along the same from the west side of Twenty-third street to the river Schuylkill, in the county aforesaid, the said
13 Filbert street being a public highway in the said city of Philadelphia, and by reason thereof the said plaintiff, during all the time aforesaid, ought to have had, and still of right ought to have, the undisturbed privilege and right of way of the said certain public highway, Filbert street aforesaid, for himself and his servants to go, return, pass and repass, every year and at all times of the year, at his and their free will and pleasure, to and from the said messuage and premises aforesaid; yet the said defendant, well knowing the premises, but wrongfully and unjustly contriving to injure the said plaintiff in that behalf and deprive him of the use and benefit of the said highway whilst the said plaintiff was so possessed of his said messuage, with the appurtenances, as aforesaid, to wit, on the first day of June, A. D. 1881, and at all times since, at the county aforesaid, wrongfully and injuriously placed and erected, and caused to be placed and erected, a certain railroad, known as an elevated railroad, on iron pillars set at the curb line of said Filbert street, in front of the plaintiff's premises aforesaid, the tracks of said

14 railroad being *of* at least twenty feet above the existing grade of said Filbert street, and kept and continued the said elevated railroad so placed and erected in the said highway, Filbert street aforesaid, for a long space of time, to wit, hitherto, and thereby, during all the time aforesaid, the said way was and still is greatly obstructed and stopped up, and the said plaintiff, by means thereof, could not, during the time aforesaid or any part thereof, nor can he now, have or enjoy the said public highway, Filbert street aforesaid, as he of right ought to have done and otherwise might and would have done, and hath been and is by means of the premises deprived of the use, benefit, and advantage thereof, to wit, at the county aforesaid.

Wherefore the said plaintiff saith that he is injured and hath sustained damage to the amount of one hundred thousand dollars, and therefore he brings his suit, &c.

M. HAMPTON TODD,
Per S. *Att'y pro Pl'ff.*

To proth. of com. pleas c't, Nov. 18, 1881.

15 (Endorsed:) 72. June term, 1881. C. P. No. 2. George R. Duncan *vs.* The Pennsylvania Railroad Company. *Narr.* Filed Nov. 18, '81.

Enter rule to plead in eight days or judgment *sec. reg.*
Nov. 18, '81.

M. HAMPTON TODD,
Att'y pro Pl'ff.

To proth'y of com. pleas c't.

16 C. P. 2. June Term, 1881.

GEORGE R. DUNCAN
vs.
THE PENNA. R. R. CO. } No. 72.

Defendant pleads not guilty.
Nov. 29, 1881.

WAYNE MACVEAGH.

To the proth'y.

(Endorsed:) 72. June term, 1881. C. P. 2. Duncan *v.* P. R. R. Co. Plea. Filed Nov. 29, '81. MacVeagh.

17 C. P. No. 2. June Term, 1881.

GEORGE R. DUNCAN
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } No. 72.

Plaintiff replies similiter issue.
Nov. 30, 1881.

M. HAMPTON TODD,
Per S. *Att'y pro Pl'ff.*

To proth'y of com. pleas c't.

(Endorsed:) 72. June term, 1881. C. P. No. 2. Duncan *v.* Penna. R. R. Co. Replication. Filed Nov. 30, '81. M. Hampton Todd.

18 C. P. No 2. Sept. Term, 1879.

GEORGE R. DUNCAN
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } No. 125.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have or maintain his aforesaid action, because it says that it, the said company defendant, was, prior to the adoption of the present constitution of this Commonwealth, *was* duly created a corporation or body politic in law by act of Assembly of the Commonwealth of Pennsylvania, approved the thirteenth day of April, A. D. 1846, to which act of Assembly the defendant hereby craves leave to refer, by the seventeenth section whereof it is provided, *inter alia*, as follows:

And it shall be lawful for the said company—meaning the Pennsylvania Railroad Company aforesaid—in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad by this act authorized to be made, to make such lateral railroads or branches leading from the main line of their said railroad to such convenient place or points in
19 either of the counties into or through which the said main line of their road may pass as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company; and afterwards, to wit, on the sixteenth day of May, A. D. 1857, by an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the sale of the main line of the public works," and approved the day and year last aforesaid, it was provided, *inter alia*, "that any company already incorporated by this Commonwealth becoming the purchaser of the said main line shall possess, hold, and use the same under the provisions of their act of incorporation and any supplements thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act in addition thereto;" and afterwards, to wit, on the first day of August, A. D. 1857, the said main line of public works was purchased by the said defendant, The Pennsylvania Railroad Company, and the said company, by virtue of the said purchase and under and by virtue of the provisions of the act of Assembly
20 last aforesaid, became entitled to have, exercise, and enjoy over the said property so purchased, including the railroad from Columbia to the city of Philadelphia, all the rights, powers, and privileges which under and by virtue of the said act of incorporation they were entitled to and did have, exercise, and enjoy over the property and railroad of it, the said company defendant, between the cities of Pittsburgh and Harrisburg in the said State.

And the defendant in fact further saith that the elevated railroad and bridge and the other buildings, structures, and improvements

in the said declaration mentioned were built, erected, and constructed and were and still are used and operated by the said defendant under and by virtue of their rights, immunities, powers, and privileges which it has and enjoys under and by virtue of the aforesaid act of Assembly, approved April 13th, 1846, without this, that the said defendant, by the construction and use of the said elevated railroad, bridge, and other structures in the said declaration mentioned, has wrongfully injured and damnified the said plaintiff in manner and form as is in the said declaration set forth,
21 and this the defendant is ready to verify.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have and maintain his aforesaid action, because it, the said defendant, prior to the adoption of the present constitution of this Commonwealth, was duly created a corporation or body politic in law by act of Assembly of the Commonwealth of Pennsylvania, approved the thirteenth day of April, A. D. 1846, to which act of Assembly defendant hereby craves leave to refer, by the seventeenth section whereof it is provided, *inter alia*, as follows: And it shall be lawful for the said company—meaning the Pennsylvania Railroad Company aforesaid—in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad by this act authorized to be made, to make such lateral railroads or branches leading from the main line of their said railroad to such convenient place or points in either of the counties into or through which the said main line of their road may pass as the president and directors may deem advantageous and suited
22 to promote the convenience of the inhabitants thereof and the interests of said company; and afterwards, to wit, on the sixteenth day of May, A. D. 1857, by an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the sale of the main line of the public works." and approved the day and year last aforesaid, it was provided as follows: "And it shall be lawful for the purchasers * * * to straighten and improve the said Philadelphia and Columbia railroad and extend the same to the Delaware river, in the city of Philadelphia;" and afterwards, to wit, on the — day of ——, A. D. 1857, the said main line of public works was purchased by the said defendant, The Pennsylvania Railroad Company, and the said company, by virtue of the said purchase and under and by virtue of the provisions of the act of Assembly last aforesaid, became entitled to straighten and improve the said Philadelphia and Columbia railroad and extend the same to the Delaware river, in the city of Philadelphia; and the defendant in fact further saith that the elevated railroad and bridge and
23 the other buildings, structures, and improvements in the said declaration mentioned were built, erected, and constructed and were and still are used and operated by the said defendant under and by virtue of the rights, powers, and privileges conferred upon said defendant by virtue of said section of said last-mentioned act, without this, that the said defendant wrongfully and injuriously did construct and use the said elevated railroad and other structures in the said

declaration mentioned, to the injury and damage of the said plaintiff, as in the said declaration alleged; and this the defendant is ready to verify.

(Endorsed:) 72. June term, 1881. C. P. No. 2. Duncan *vs.* P. R. R. Co. Additional pleas. Filed May 1, 1882.

24 Common Pleas No. 2. June Term, 1881.

GEORGE R. DUNCAN
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } No. 72.

And the said plaintiff, as to the plea of the said defendant by it secondly above pleaded, says he ought not to be barred from having and maintaining his aforesaid action against the defendant by reason of anything in said plea alleged, because he says that the said defendant, at the said time when, &c., of its own wrong and without the cause by it in said second plea alleged, by the construction and use of the said elevated railroad bridge and other structures in the said declaration mentioned, wrongfully injured and damnified the said plaintiff in manner and form as is in the said declaration set forth; and this he prays may be inquired of by the country, &c.

And the said plaintiff, as to the plea of the said defendant by it thirdly above pleaded, says he ought not to be barred from
25 having and maintaining his aforesaid action against the defendant by reason of anything in said plea alleged, because he says that the said defendant, at the said time when, &c., of its own wrong and without the cause by it in said third plea alleged, wrongfully and injuriously did construct and use the said elevated railroad and other structures in the said declaration mentioned, to the injury and damage of the said plaintiff, as is in the said declaration alleged; and this he prays may be inquired of by the country, &c.

May 1, 1882. M. HAMPTON TODD,
Att'y pro Plaintiff.

(Endorsed:) 72. June term, 1881. Common pleas No. 2. Duncan *vs.* The Penna. Railroad Company. Replication to additional pleas. Proth'y will enter rule to rejoin in eight days, or judgment *sec. reg.* M. Hampton Todd, *pro* pl't'ff. Filed May 31, '82. M. Hampton Todd.

26 C. P. 2. June T., 1881.

GEORGE R. DUNCAN
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } 72.

And as to the replication of pl't'ff to the second and third pleas of the defendant, wherein the pl't'ff put himself upon the country, defendant doth the like.

June 3, 1882.

MACVEAGH,
Pro Def't.

(Endorsed :) 72. C. P. 2. June T., 1881. Duncan *vs.* Penna. R. R. Co. Rejoinder. Filed June 3, '82. MacVeagh.

27 C. P. 2. June Term, 1881.

GEORGE R. DUNCAN
vs.
PENNSYLVANIA RAILROAD Co. } No. 72.

1. The defendant pleads not guilty.

2. And for a further plea in this behalf the defendant says that the plaintiff ought not to have or maintain his aforesaid action, because it says that it, the said company defendant, prior to the adoption of the present constitution of this Commonwealth, was duly created a corporation or body corporate in law by act of Assembly of the Commonwealth of Pennsylvania, approved the thirteenth day of April, A. D. 1846 (to which act of Assembly defendant hereby craves leave to refer), by the seventeenth section whereof it is provided (*inter alia*) as follows:

"And it shall be lawful for the said company (meaning the Pennsylvania Railroad Company aforesaid), in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad, by this act authorized to be made, to make such lateral railroads or branches leading from the main
28 line of their railroad to such convenient place or points in either of the counties into or through which the said main line of their railroad may pass as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company;" and afterwards, to wit, on the sixteenth day of May, A. D. 1857, by an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the sale of the main line of the public works," and approved the day and year last aforesaid, it was provided (*inter alia*) "that any company already incorporated by this Commonwealth becoming the purchaser of the said main line shall possess, hold, and use the same under the provisions of their act of incorporation and any supplements thereto; modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act in addition thereto;" and afterwards, to wit, on the first day of August, A. D. 1857, the said main line of the public works was purchased by the said defendant, The Pennsylvania Railroad
29 Company, and the said company, by virtue of the said purchase and under and by virtue of the provisions of the act of Assembly last aforesaid, became entitled to have, exercise, and enjoy over the said property so purchased, including the railroad from Columbia to the city of Philadelphia, all the rights, powers, and privileges which under and by virtue of the said act of incorporation they were entitled to have and did have, exercise, and enjoy over the property and railroad of it, the said company defendant, between the cities of Pittsburgh and Harrisburg, in the said State.

And the said defendant in fact further saith that the said railroad bridges and other buildings and structures and improvements in the said declaration mentioned constituted in no other sense an elevated railroad than as such elevation of grade was necessary in crossing the Schuylkill river and passing overahead and leaving travel unobstructed on the largely traveled streets of Philadelphia intervening between and including Fifteenth and Twenty-fourth streets, and were built, erected, and constructed and were and
30 still are used and operated by the said defendant only under and by virtue of the aforesaid acts of Assembly, approved April 13, 1846 (and May 15, 1857), without this, that the said defendant, by the construction and use of the said railroad bridges and other structures in the said declaration mentioned, has wrongfully injured and damnified the said plaintiff in manner and form as is in the said declaration set forth; and this the defendant is ready to verify.

3. And for a further plea in this behalf the defendant says that the plaintiff ought not to have and maintain his aforesaid action, because it says that it, the said company defendant, prior to the adoption of the present constitution of this Commonwealth, — duly created a corporation or body corporate in law by act of Assembly of the Commonwealth of Pennsylvania, approved the thirteenth day of April, A. D. 1846 (to which act of Assembly defendant hereby craves leave to refer), by the seventeenth section whereof it is provided (*inter alia*) as follows:

31 "And it shall be lawful for the said company (meaning the Pennsylvania Railroad Company aforesaid), in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad by this act authorized to be made, to make such lateral railroads or branches leading from the main line of their railroad to such convenient place or points in either of the counties into or through which the said main line of their railroad may pass as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company."

And afterwards, to wit, on the sixteenth day of May, A. D. 1857, by an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the sale of the main line of the public works," and approved the day and year last aforesaid, it was provided (*inter alia*) as follows:

"And it shall be lawful for the purchasers to straighten and improve the said Philadelphia and Columbia railroad and extend the same to the Delaware river, into the city of Philadelphia."

32 And afterwards, to wit, on the first day of August, A. D. 1857, the said main line of public works was purchased by the said defendant, The Pennsylvania Railroad Company, and the said company, by virtue of the provisions of the act of Assembly last aforesaid and by virtue of the said purchase, became entitled to straighten and improve the said Philadelphia and Columbia railroad and extend the same to the Delaware river, in the city of Philadelphia; and the defendant in fact further saith that the said railroads,

bridges, and other buildings, structures, and improvements in the said declaration mentioned constituted in no other sense an elevated railroad than as such elevation of grade was necessary in crossing the Schuylkill river and passing overhead and leaving travel unobstructed on the largely travelled streets of Philadelphia intervening between and including Fifteenth and Twenty-first streets, and were built, erected, and constructed and were and still are used and operated by the said defendant (only) under and by virtue of the rights, powers, and privileges conferred upon said defendant by virtue of said section of said last-mentioned act, without this,
33 that the said defendant wrongfully and injuriously did construct and use the said railroad bridges and other structures in the said declaration mentioned, to the injury and damage of the said plaintiff, as in said declaration alleged; and this the said defendant is ready to verify.

APRIL 30, 1883.

It is agreed that the foregoing pleas shall be substituted for the pleas heretofore filed, and that the replications and rejoinders heretofore filed shall be applicable to them as if they had been originally filed as the pleas of the defendant in said cause.

M. HAMPTON TODD,
Pro Pl'ff.
WAYNE MACVEAGH,
For Def't.

(Endorsed:) 72. June term, 1881. C. P. 2. Duncan *vs.* Penna. R. R. Co. Pleas. Filed as per within agreement. Filed May 7, 1883. J. Briggs.

34 At a court of common pleas number two, for the county of Philadelphia, held Monday, January 14, 1884, *coram* Judge Fell.

"C." J., '81.

GEORGE R. DUNCAN
vs.
PENNSYLVANIA R. R. Co. } 72.

And now, to wit, Jan'y 14, 1884, a jury being called, came, to wit, James Brown, Hamilton Clayton, Mark Costello, James H. Whaley, Jas. R. Walls, Frank Whitcomb, David Welsh, Wm. A. Parnell, Henry Patton, Samuel Davis, James Cranston, William Miles, and, being duly empannelled, sworn, or affirmed, respectively do say, Jan'y 28, 1884, verdict for pl'ff, $20,000.

Judgment Index.

Defendant: Pennsylvania Railroad Company.
Plaintiff: George R. Duncan.
Court: No. 2.
Term: J., '81.
No.: 72.
Att'y: M. H. Todd.
Date: Jan'y 18, 1884.
Verdict.

35 At a court of common pleas number two, for the county of Philadelphia, held Tuesday, January 22d, 1884, *coram* Judge Fell.

"C." J., '81.

DUNCAN *vs.* FELL. } 72.

Fell, J. Jan'y 14, '84.

And now, Jan'y 22, 1884, def't, by its counsel, MacVeagh, moves for a new trial.

Eo die, reasons filed.

And now, Jan'y 22, '84, motion for judg't *non obstante veredicto*.

Eo die, motion on part of pl'ff for new trial.

C. P. No. 2. June Term, 1881.

36 DUNCAN *vs.* P. R. R. Co. } No. 72.

And now, January 21st, 1884, the plaintiff, by his attornies, M. Hampton Todd, Esq., and George W. Biddle, Esq., moves the court for a rule on the defendant to show cause why a new trial should not be granted, and assigns the following as reasons for a new trial:

First. The verdict was against the evidence in the cause.

Second. The verdict was against the weight of the evidence in the cause.

Third. The damages are insufficient to compensate the plaintiff for the injuries done to his property by the defendant.

M. HAMPTON TODD.
GEO. W. BIDDLE.
Per T., *Pro Pl't'ff.*

(Endorsed:) 72. June T., 1881. C. P. No. 2. Duncan *vs.* Penna. R. R. Co. Fell, J. Jan'y 18, '84. Motion for a rule for new trial & reason therefor. Filed Jan'y 22, '84. Thos. B. Reeves. Todd. Biddle.

37 *Reasons for New Trial and for Judgment for Def't non Obstante Veredicto.*

C. P. 2. June Term, 1881.

DUNCAN *vs.* P. R. R. Co. } 72.

1. The damages assessed by the jury were excessive and were against the weight of the evidence.

2. Under the evidence in this case the pl't'ff was not entitled to recover in an action on the case for any damages alleged to have

been caused by the construction by the def't of its Filbert Street Branch or Extension.

3. Under the evidence in this cause the pl't'ff was not entitled to recover against the defendant for consequential damages to his property by reason of the construction of its Filbert St. Branch or Extension, and as the pl't'ff's claim was for consequential damages only the verdict should have been for the def't.

4. The court erred in not charging the jury as reported in the points submitted by the def't.

38 5. The court erred in not admitting the evidence whether that the pl't'ff held the title to the real estate in question only as a naked trustee for one or more national banks.

6. The court erred in not admitting evidence of the portion taken by the def't at the meeting of the committee officials before the ordinance in evidence had been passed.

7. The court erred in charging the jury that they were at liberty to allow the plaintiff damages for the liability of his property to fire by reason of the operation of the road of the def't.

WAYNE MACVEAGH,
Def't's Att'y.

(Endorsed:) 72. June Term, 1881. C. P. 2. Duncan *v.* Penn. R. R. Co. Fell, J. Jan'y 14, '84. Reasons for new trial, &c. Filed Jan'y 23, '84. Wenderdine.

39 At a court of common pleas number two for the county of Philadelphia, held Thursday, March 6th, 1884, *coram* Judges Hare, Mitchell, and Fell.

New Trial Motion List.

J., '81.

DUNCAN *v.* R. R. } 72.

Rule granted.

At a court of common pleas number two for the county of Philadelphia, held Saturday, March 15th, 1884, *coram* Judges Hare, Mitchell, and Fell.

Motion List.

J., '81.

DUNCAN *v.* R. R. Co. } 72.

Pl'ff's rule withdrawn.

At a court of common pleas number two for the county of Philadelphia, held Thursday, June 12, 1884, *coram* Judges Hare, Mitchell, and Fell.

New Trial Argument List.

J., '81.

DUNCAN
v.
R. R. } 72.

Rule discharged & judg't for pl'ff on point reserved.

40 C. P. 2. J., '81.

GEORGE R. DUNCAN
vs.
THE PENNSYLVANIA RAILROAD CO. } No. 72.

And now counsel for the defendant come and except to the entry of judgment by the court for the plaintiff upon the points reserved.

FOX,
MACVEAGH,
For Def't.

(Endorsed:) 72. June T., 1881. C. P. 2. Duncan *vs.* Penna. R. R. Co. Exceptions to judgment on points reserved. Filed June 13, 1884. Thos. B. Reeves.

41 And now, to wit, June 16th, 1884, the jury fee being paid, judgment is entered on the verdict for plaintiff for twenty thousand dollars.

Whereupon it was considered by our said court before our said judges that the plaintiff, George R. Duncan, recover of the Pennsylvania Railroad Company the sum of twenty thousand dollars for his judgment, and also the further sum of two hundred and seventy-six $\frac{12}{100}$ dollars for his costs and charges by him about his suit in that behalf expended. Whereof the said defendant is convict, as appears of record, &c.

And the defendant, in mercy, &c.

Judgment Index.

Defendant: Pennsylvania Railroad Company.
Plaintiff: George R. Duncan.
Court: No. 2.
Term: J., '81.
No.: 72.
Att'y: M. H. Todd.
Date: June 16, 1884.
Am't: $20,000.00.

42 Be it remembered that in the term of June, A. D. 1881, came George R. Duncan into the court of common pleas No. 2 for the city and county of Philadelphia and impleaded the Penn-

sylvania Railroad Company in a certain plea of trespass on the case, &c., in which the said George R. Duncan declared (prout *narr.*) and the said Pennsylvania Railroad Company pleaded (prout pleas); and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the county aforesaid, before the Honorable D. Newlin Fell, associate justice of the said court, on the 14th day of January, A. D. 1884, the aforesaid issue between the said parties came to be tried by a jury of the said county for that purpose duly impannelled (prout list of jurors); at which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impannelled to try the said issues, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said
43 plaintiff, to maintain the issue on his part, offers in evidence deed — William Elliott, sheriff, to plaintiff, George R. Duncan, dated 15th July, 1876, recorded in common pleas No. 4, Sheriff's Deed Book No. 46, page 243, for premises northwest corner Filbert & 23rd streets, Philadelphia, containing on 23rd street 153 feet six inches, and extending in depth westward along Filbert street to low-water mark of the river Schuylkill (prout the same); also deed — William Elliott, sheriff, to George R. Duncan, dated 16th December, 1876, recorded in common pleas No. 4, in Sheriff's Deed Book 50, page 307, for premises immediately adjoining to the northward the premises described in the first deed offered, and containing 77 feet and five inches (prout the same).

NOTE.—The defendant admits that in pursuance of the authority vested in it, as set out in its pleas filed in this case, it erected and now operates the structure which is elevated above the surface of Filbert street opposite the property of the plaintiff at 23rd and Filbert streets. It admits that this structure was open for freight business April 25th, 1881, and for passenger business December 5th, 1881.

Plaintiff offers in evidence plans produced by the defendant on call of the plaintiff, showing, first, the elevation of the rail-
44 road in front of the plaintiff's property; second, ground plan of the tracks; third, ground plan of plaintiff's property in connection with the tracks (prout the same).

NOTE.—Six photographs of the locality in question offered in evidence by plaintiff (prout the same).

CHAS. F. GUMMEY, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

Q. You have been in the real estate and conveyancing business in this city for a considerable period of time, have you not?

A. Over 25 years.

Q. What, if any, is your knowledge of the city property in the

old city plot and in the suburbs as acquired in business during this time?

A. I think it is very general and very good.

Q. Have you not infrequently been called upon to give the values of property?

A. Yes, sir; we are called upon very frequently to give values of property for parties who are about to purchase or about to place money upon mortgage.

Q. That is a regular part of your business to ascertain the values for either of those purposes?

A. Yes, sir.

Q. Do you know the line of the Filbert Street Extension of
45 the Pennsylvania railroad as going through the old city from Merrick street to the Schuylkill?

A. Yes, sir.

Q. Are you reasonably familiar with it?

A. Yes, sir.

Q. Did you, at the request of the plaintiff's agent, at any time make a special examination of the line of this extension in front of the plaintiff's property, beginning at the northwest corner 23rd and Filbert street and running west; and, if so, when?

A. I have been there and I have examined it four or five times within the last year or so—within the last year or 18 months. I was there last this morning.

Q. Then you can give us your most recent experience. You have heard it given in testimony here and you probably knew when this road was erected?

A. It was erected during '80 and '81.

Q. A little east of 23rd street it deflects from the line of private property north, doesn't it?

A. Yes, sir; into the centre of the street.

Q. Look at that photograph marked in pencil "D" and state whether you recognize it.

A. Yes, sir; that is correct.

Q. What does it exhibit?

A. It exhibits the railroad as erected on the line of Filbert street from 23rd street west.

46 Q. Can you tell us about the height of this structure?

A. I think it is about 30 feet there.

Q. About how wide is it—that is to say, how much of the pebble way and sidewalk does it occupy, if any? State as near as you can.

A. It covers all of the street cart-way and about four feet of the sidewalk.

Q. That is, it would overshadow about four feet of the sidewalk?

A. Yes, sir.

Q. Was there any structure in the sidewalk or pavement?

A. All the iron columns are inside of the curb-line.

Q. For instance (referring to photograph), that would represent one?

A. Yes, sir.

Q. That is actually on the pavement?

A. Yes, sir; actually on the pavement, extending about two feet and a half inside of the curb-line.

Q. Is there a curb-stone there?

A. Yes, sir.

Q. The plan marked "E" in lead-pencil exhibits accurately the appearance, so far as a photograph can, doesn't it?

A. Yes, sir.

Q. Please state to the court and jury your estimate of the value of this property which runs the whole way along Filbert
47 street into the river and runs about 231 feet on the west side of 23rd street. I want to know that, just before this erection took place, as unaffected by it—say in '79.

A. I would estimate the value of this property at that time at $150,000.

Mr. MacVeagh objects to any testimony as to any damage alleged to have been suffered by the plaintiff. In the first place there is no liability by the company in this action, and secondly there is no liability on the part of the defendant for any consequential damages. Objection overruled. Exception for defendant.

Mr. BIDDLE (to the witness):

Q. Please state whether you had regard to the structures upon it or not; and, if you had, state what you allowed for them, entering a little into detail.

A. I estimate the ground at that time to be worth $100,000 and the buildings $50,000.

Q. How did you take the frontage of that property?

A. Well, you could take it either way, on Filbert or on 23rd, but in round figures, on 23rd street, it is worth $2,500 a foot.

Q. That would be a little more than $100,000?

A. Yes; a little more than $100,000.

Q. You estimated the 23rd street front, which was two hun-
48 dred and thirty-one feet, at five hundred dollars a foot, which we will call one hundred and fifteen (it is a trifle over), but we will say one hundred and fifteen thousand dollars, and the structures at fifty thousand dollars; two hundred and thirty would be just one hundred and fifteen thousand dollars. Is that right?

A. Yes, sir.

Q. What injury, if any, in your judgment and opinion, was caused to this property by this structure and concomitants? You have heard that it was finally finished for freight traffic in April, 1881, and for passenger traffic in December, 1881, and you have been there many times, and as late as this morning?

A. I should say the selling value of that property was depreciated one-third.

Q. Fifty thousand dollars?

A. Yes, sir.

Q. You have had some experience rather recently in uptown values—western values—have you not; say in the last five or six years?

A. Within two years I have sold property at 25th and Hamilton St.

Q. The jury know, I presume, but Hamilton street is the street just by where the Reading railroad goes out, is it not?

A. Yes, sir.

Q. It is north of Callowhill, isn't it?

49 A. Yes, sir; Hamilton street is a square this side of Pennsylvania avenue.

Q. You have had experience within as late as two years, and your knowledge, based upon all your experience, is as you have stated it?

A. Yes, sir.

Q. Did you visit this property at any time in company with any other gentleman of your own profession?

A. Yes, sir.

Q. Whom?

A. Mr. Barry and Mr. Fritz, and, at another time, Mr. Ritter.

Q. Mr. Ritter has been very ill for some time, has he not?

A. Yes, sir.

Q. Have you seen him recently out in the street?

A. He rides to his office within the last week or two and stays there perhaps an hour or two.

Q. His health is insecure?

A. Yes, sir. I doubt whether he would be able to come up these stairs.

Q. How close does any part of the elevated structure of this Filbert Street Extension come to the building lines on the north side?

A. (Referring to photograph.) This guard crosses the street.

50 Q. That paling, represented as a kind of a paling, is what you call the guard?

A. Yes, sir. It is a screen, more properly. It must come within a foot or two of the building line.

Q. As you have already said, the whole of the cartway and part of the footway are occupied?

A. Yes, sir.

Q. It is so occupied above as well as below?

A. Yes, sir.

Mr. MacVeagh: He does not mean that it is occupied below.

Mr. Biddle: Yes, he does. I have understood him to say so, and I will ask him again: Do the upright metallic supports occupy the pavement or not—the footway?

A. They occupy so far as their size, of course; between the posts they don't occupy it.

Q. Give us about the size; about 18 inches square or two feet square?

A. About eighteen inches square, the columns are. The feet in which they rest are larger—about two feet and a half perhaps, the bases.

Q. That white line represents one of those bases?

A. Yes, sir.

51. Q. The rest of the pavement, the base being, as you say, two feet to two feet and a half square or thereabouts?

A. Yes, sir.

Q. These columns go on at intervals continuously along the pavement, do they not?

A. About 50 feet apart.

Q. And so on until you come to the bridges from the Schuylkill?

A. Yes, sir.

Q. What is occupied when you get to the elevation which you have said is 30 feet or thereabouts? Describe it. There is a platform, isn't there?

A. There are iron girders extending from the posts which are separated from each other the width of the tract; then upon those girders are the ties, and on that the rails. The ties are very close, so that while there is a space between the ties of perhaps the width of the ties, and intervening space about the width of the ties, at the same time the depth of the girders prevents any light from falling at an angle in any way. What little light does come through comes down entirely perpendicularly.

Q. What would be about the top elevation of this screen or guard—how high would the comb of that screen be above
52 the footway?

A. I should judge about 40 feet.

Q. Is it as high or not as the structures there?

A. The screen is higher. This is the line of the rail (indicating).

Q. Where those white points are?

A. Yes, sir; the top of the girders; the screen is above that.

Q. What effect, in the first place, has this upon the access of light to buildings on the north side of the street. I mean the whole structure; I do not confine myself to the screen. What effect would it have on the different stories of the buildings?

A. The light is almost entirely taken away close to the railroad.

Q. What effect has the running of the trains upon it; trains do run on it, to your knowledge, do they not?

A. Yes, sir.

Q. About with what frequency do they run? You have been there several times.

A. I was there this morning. There were nine trains in ten minutes this morning.

Q. Is there any noise from the trains?

A. Yes, sir; very much noise.

Q. Are there any cinders or sparks?

A. There is a very great smoke. I didn't see any cinders myself this morning.

53 Q. Have you ever seen cinders?

A. Oh, yes; I have seen them on the pavement—plenty of them, at times.

Q. What else did you find, if anything, on the pavement or cartway at any time that you have been out there?

A. I haven't seen anything that has fallen from there at all.

Q. Then, I understand, your judgment is based upon the facts

produced by the deprivation of lights, by noise, by smoke, by cinders, and the like?

A. Yes, sir.

Q. Those are the elements which you think go to the depreciation of the property in the way you have spoken of?

A. Yes, sir.

Q. Is there anything else that I have not referred to which occurs to you now?

A. There is more or less vibration?

Q. These trains—you counted nine in ten minutes—do you know of your own knowledge about how often they go in the course of the 24 hours?

A. No, sir; except when I saw them.

Cross-examination by Mr. Fox:

Q. How long have you been in the real estate business?

54 A. Over 25 years.

Q. You have had this property in charge, have you, for sale at any time during that period?

A. Not for sale; no, sir.

Q. Have you ever offered it for sale?

A. No, sir; it was not in our hands for sale; there was a probability that we might sell it. We at times, even when the property is not for sale, if we think there is a probable buyer, we endeavor to make a sale.

Q. In your experience of 25 years have you known, or not, depressions in value of real estate at various times?

A. Yes, sir.

Q. Such as panics?

A. Yes, sir.

Q. Do you recollect the values as they fell about 1873?

A. Yes, sir; I remember.

Q. What was the cause of that?

A. I remember there was a panic in 1873; but dwelling-houses and store property didn't fall, as a rule, until after 1876. Manufacturing properties were rather dull after the panic—a year or two after the panic.

Q. Up to that time they had retained what you would regard as normal value?

A. Yes, sir.

55 Q. And were as high as they have been since, generally?

A. No, sir.

Q. I am speaking of the general market?

A. No, sir; manufacturing property is worth more to-day than it was five or six years ago.

Q. Were manufacturing properties affected by this panic?

A. Yes, sir.

Q. To what extent?

A. With manufacturing properties there is no criterion—no regular discount. In some cases it might be twenty or twenty-five per cent.; in others it might be more.

Q. What would make the regular discount, as you term it, the demand?

A. The demand, certainly. There is the demand; then there is the ability to hold until the next turn comes.

Q. Take the real estate market generally, from 1873 down. How long did that depression last and to what extent has it recovered?

A. Are you speaking of manufacturing properties or generally?

Q. I am speaking of the general real estate market. You say there is no criterion of manufacturing properties?

56 A. The real estate market has been improving for the last four years—four or five years.

Q. That would be since 1880?

A. Yes, sir.

Q. Then the effects of the depression were felt up to that time, were they?

A. Up to 1880? Manufacturing property was depressed sooner than the general market and appreciated sooner than others.

Q. To the same extent it stood before the panic?

A. Do you mean is it as high now as it was before?

Q. Generally. You say there has been no criterion?

A. I didn't say there was no criterion. I said there was no specific discount that you could put upon manufacturing properties. Some kinds would be depreciated more than others.

Q. Then I understand you to say it was regulated by the demand?

A. Yes, sir.

Q. What demand has there been for this property since 1874 or 1875?

A. That I couldn't tell you, because it has not been for sale.

Q. From what standard of judgment do you base your value of five hundred dollars a foot?

57 A. From values almost—partially in that neighborhood.

Q. And at what time?

A. At that time—at the time I gave my testimony as regards the value.

Q. Do you mean immediately prior to the erection of this road?

A. For instance, land on Market street about that time was worth one thousand dollars a foot, say. That is only one hundred and fifty feet deep. Here it is two hundred and twenty-four feet deep, with a river front—with that front which is very valuable to any manufacturing property. This property, 25th and Hamilton, which is in the neighborhood, very similar to this—we sold a lot two hundred feet square for forty-two thousand dollars. This is two and a third or two and a half times as large, and has the wharf facility, which the other does not. The other had neither wharf nor railroad, so that that was a cash sale—sold for cash to a party who wanted it.

Q. How much was that per foot?

A. That was a little over two hundred dollars a foot, but if you turn this on the four hundred and twenty-four feet, the same depth, understand, of course you get nearly one hundred thousand dollars.

58 Q. That is doubling the superficial contents?

A. Double the contents. You get nearly one hundred thousand dollars. Of course, you have here the wharf facilities that the other did not.

Q. Then your judgment is that this property is precisely similar in point of value to the Market-street property of the same depth?

A. Oh, no, sir. I gave you the Market-street property, 180 feet deep, at one thousand dollars a foot. This is four hundred and twenty-four feet deep for only five hundred dollars.

Q. The Hamilton-street property you place with this as to the value, excepting as to the double front?

A. The Hamilton-street property I think is a very fair criterion, because it is manufacturing property in a manufacturing district within three or four squares of this property. This property, being nearer Market street, I consider much more valuable than up on Hamilton street.

Q. Do you know of any sales in that immediate vicinity, say from 23rd to Market, to Hamilton; any other properties similarly situated having the wharf front?

59 A. I don't know of any on 33rd street with the wharf front. The Reading Railroad Company bought the whole square between Arch and Cherry, but I don't know what they paid for it. I know they asked at least five hundred dollars a foot for it—Arch to Cherry and 23rd to the river.

Q. You have said that you valued this property with its relation to its ability to carry mortgages, too. You generally value property, as an expert, with a view to its mortgage value?

Mr. BIDDLE: He said selling the mortgage.

The WITNESS: For mortgage purposes.

Mr. FOX:

Q. With regard to the question of mortgage, is there any rule or is there any recognized custom among your profession as to the margins of loan upon mortgaging properties?

A. There is no custom; it remains to the individuals themselves. After they get our value they can loan as much as they please, whether it would be 50, 60, or 65 per cent.

Q. Is there a rule as to dwelling properties and store-house properties?

A. No, sir; the rule depends upon the demand for mort-

60 gages. Two or three years ago they would not loan but 50 per cent.; now I know of companies loaning 75 per cent., because mortgages are scarce.

Q. Upon manufacturing properties?

A. Dwellings, you asked me.

Q. Is it or is it not a fact that the trust companies and other large investors and capitalists will not loan as much on manufacturing properties as on other properties, say dwelling and store properties? A higher percentage I mean.

A. As a rule they will not.

Q. Why?

A. Because a great deal of the value of the property depends on the success of the manufacturers, and depends upon their ability.

Q. That is to say, the establishment is there for the purpose for which it was designed?

A. Yes, sir.

Q. Not to be originally made into any promiscuous purpose beyond that?

A. No, sir; in estimating the buildings—these buildings which were put up originally for the Girard Tube Works—I don't suppose could be put there for seventy-five or eighty thousand dol-
61 lars. In placing them at fifty thousand dollars I placed them at the value they would be worth to some one for some other purposes.

Q. How long has this property been idle, or is it in active operation now?

A. It is not in active operation; no, sir.

Q. How long has it been idle?

A. Five or six years. I can't tell you exactly.

Q. Since some time antecedent to the building of the Filbert Street Extension?

A. It was some time before; whether it was a month or a year I can't tell you at the present time.

Q. As an expert you value other manufacturing properties?

A. Yes, sir.

Q. Do you find, or do you not find, that there is more or less noise in manufacturing properties, particularly iron-working establishments?

A. There is more or less noise in some manufactories—in most of them, of course.

Q. Is it not so that at times you cannot hear your neighbors speak to you unless he comes close to your ear and talks to you?

A. That depends upon what kind of a factory you are in.
62 Q. Take tubes and iron generally, where steam-engines are employed.

A. Yes, sir.

Q. Is there not more or less vibration in establishments that you speak of?

A. No, sir; I can't say that there is. Heavy machinery is generally planted on the ground.

Q. Has the Filbert-street front of this property, to your knowledge, ever been used as a means of ingress and egress to the Girard Tube Works?

A. I knew nothing of it while it was occupied.

Q. I mean within your knowledge, of course.

A. No, sir; I can't say.

Q. Is there any means of ingress or egress through the Filbert-street front?

A. I think there was, but I think it is closed at the present time purposely to keep out outsiders. There is a man here, who, perhaps, will be on the stand, who will tell you better with regard to that than I can.

Q. Do you know the condition of the street wharves on the Schuylkill, so far as the dominion by the city is concerned? I speak of their being leased or not.

A. I don't know.

63 Q. Do you know of any part of the street between 23rd street and the river Schuylkill being occupied in any other way than public use?

A. No, sir.

Q. Do you know the establishment of Warren, Kirk & Company, coal tar?

A. There are barrels there; whether it is occupied by authority or not that I couldn't tell you. At the west end of the bridge there are a number of tar barrels there.

Q. Do you consider that there is any benefit to be derived at all from the location of an industrial establishment on the line of a railway?

A. That depends very much upon the establishment and depends upon what you want. Railway facilities are so plenty around the city of Philadelphia that it adds nothing to the value. You can buy property upon Washington street to-day for one-half what you could ten or fifteen years ago, so that a railroad in front of a property will depreciate it more, if it be of any value at all; if it be worth more than four or five dollars a foot it will depreciate it more than it will appreciate it.

Q. Where do you live?

A. Germantown.

Q. Do you go out on the road every day?

64 A. On the Germantown road, yes, sir.

Q. Do you know the industrial establishments that have clustered thick along that railroad since you have been going there?

A. I don't know of many new ones, except at Germantown junction there are two new ones, I think.

Q. You know the establishments that were there had railroad switches?

A. Yes, sir; and some have been taken out.

Q. Do you know Power and Weightman's, 9th and Brown?

A. Yes, sir.

Q. Do you know the Girard Flour Mills, Poplar street?

A. Yes, sir.

Q. Do you know Hyzer and Lewellen, fire-brick?

A. There are coal yards all along 9th street.

Q. Do you know Smith's large new establishment, at the corner of 9th and Girard avenue, Chicago beef?

A. Yes, sir.

Q. He has a siding?

A. Yes, sir.

Q. Do you know Rhiele, scale works?

A. Yes, sir.

65 Q. Do you know the cotton works, 9th and Columbia avenue?

A. Yes, sir.
Q. Th hosiery mills, at 9th and Columbia avenue?
A. Yes, sir.
Q. Do you know Carey's large wall-paper establishment, on Susquehanna avenue?
A. Yes, sir.
Q. Built there in your recollection?
A. Yes, sir; these others were not built within recent years that you have been asking me about. Carey's was, and the Chicago beef establishment.
Q. Did not Rhiele's move once—been moving on that road from 9th and Wallace to 9th and Master?
A. Yes, sir; because the Reading railroad bought them out.
Q. Isn't it a fact that along the line of that railroad they are clustered so thickly with manufacturing establishments there is hardly room for coal yards?
A. I don't know that.
Q. The balance of the space is taken up by coal, lime, and wood yards, is it not?
A. Yes, sir.

66 Q. Do you know along the Reading coal road, at Nicetown, a new establishment going up there?
A. Yes, sir.

Q. Do you know the oil-cloth works?
A. Yes, sir.
Q. Do you know the Midvale Steel Works?
A. Yes, sir.
Q. Do you know Potter's, on the connecting railroad?
A. Yes, sir.
Q. Do you know Dobson's?
A. Yes, sir; they bought at low prices; they bought at two thousand dollars an acre?
Q. Tell me what would be the value of these properties if they were all moved four blocks away from the railroad—would it affect their value or not?
A. As far as the value of the land is concerned I think it would improve it.
Q. Would it improve the value of the industrial establishments?
A. That I don't know. That would depend on circumstances.

Redirect examination by Mr. BIDDLE:

67 Q. We have put you on both sides through a pretty long series of questions as to the details of appreciation and depreciation. I understand you to say to the jury that taking everything into view you think the difference is about one-third in value?
A. Yes, sir.
Q. And you have discounted or accounted for all these supposed advantages or disadvantages in saving that?
A. Yes, sir.

Deposition of Abram Ritter, who is too ill to be present at the trial, read by Mr. Todd.

JOSEPH B. BARRY, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

Q. How long have you practiced your profession of conveyancing and real estate broker?

A. Over forty years.

Q. You have been in business actively in this city during that time?

A. Continuously all those years.

Q. You also have been for a considerable period of that time an assessor?

A. I have, for the last five years.

Q. I suppose I may say for you that you are reasonably familiar with values in this city of real estate?

68 A. From the knowledge of my business in buying and selling real estate and investing during all these years large amounts of money or mortgage naturally I became familiar with the values of property throughout most all the sections of the city of Philadelphia. I suppose in my time I have invested millions of dollars upon mortgage, and during all this time I can say I never lost a dollar in the investment of money on mortgage.

Q. You know, of course, familiarly the line of the Filbert Street Extension of the Pennsylvania railroad on this side of the river?

A. I do, and have examined it several times.

Q. You have examined it at the request of the plaintiff in this case, have you not?

A. Yes, sir.

Q. Will you kindly tell us, if you recollect, the first time and tell us the last time?

A. I suppose I have been out there four or five times in the last eighteen months. I have been there alone and I have been there with others.

Q. Name the gentlemen you went there with.

69 A. I have been there with Mr. Fritz and Mr. Gummey, and on other occasions I went on my own examination specially. My last visit, I think, was when this case was up for trial before. I have not been there since.

Q. You were there within about three months ago?

A. Yes, sir.

Q. In the fall of the last year?

A. Yes, sir; I think so.

Q. Do you feel competent to pronounce upon its value?

A. My views of the value of that property are about one hundred and fifty thousand dollars. I arrived at that value.

Q. Do you mean before this erection?

A. I mean before the railroad was there. I mean before the rail-

road was there my valuation of that property was one hundred and fifty thousand dollars.

Q. Tell us how you arrived at that.

A. My views, taking the 23rd-street front, I value it at five hundred dollars a foot, which we call thirty dollars a foot ground rent. The balance I value the buildings.

Q. That is to say, you would make the land about one hundred and ten thousand dollars and the buildings about forty thousand dollars?

70 A. I make the land about one hundred and fifteen thousand five hundred dollars and the buildings about thirty-five thousand dollars; the difference is the buildings.

Q. State what, in your judgment, if any, is the depreciation of this property, caused by the erection which we have talked of a good deal this morning, and of which you have seen the plans.

A. The value of a property is predicated on its front upon a street and the facilities of the use of the street. This property by reason of this road is deprived of the free use of Filbert street along the whole continuous front of four hundred and twenty-six feet. The railroad occupies the whole bed of the street—that is, the roadway of the street, the columns being on the pavement. Therefore this property is cut off entirely from the use of this street, and I think injured by reason of this to the extent of fifty thousand dollars. If this property was mine and fifty thousand dollars had been offered to me I would have rejected the fifty thousand dollars and kept my property as it was.

71 Q. That is to say, if fifty thousand dollars had been offered to you?

Mr. MacVeagh: I do not think you want to emphasize that.

Mr. Biddle: I do not want to emphasize it; I want to have this meaning clearly.

Mr. MacVeagh: The question is the depreciation.

The Witness: My answer to that would be, It is fifty thousand dollars.

Mr. Biddle:

Q. You were sitting in the court-house when Mr. Gummey testified?

A. Yes, sir.

Q. Did you hear his testimony?

A. I did.

Q. You heard me ask him questions as to the deprivation of light, the effect of sparks, cinders, smoke, noise, and the vibration of the building. What is your opinion in regard to those disturbing elements?

A. All those statements made by Mr. Gummey I fully accord with, without going into them specifically. On the road—and the vibrations, the running of the cars, is almost continuous.

Q. Of course, in your estimate of this property, you took into view

its different applicabilities. You did not confine it to one
72 particular case of dealing or business, did you?

A. Not at all. According to my views I say that that property is worth five hundred dollars a foot. Therefore I say that the taking away of the use of this street produces the damage I stated.

Q. With the consequent noise, sparks, vibrations, and deprivation of light?

A. Yes, sir.

Cross-examination by Mr. Fox:

Q. What is the duty of an assessor?

A. The duty of an assessor of real estate is to value according to the act of Assembly. It is to value the real estate at such a price as it would bring at a fair sale after due notice.

Q. Do you know the assessment of this property?

A. I do not.

Q. You are not assessor of this district?

A. I am not.

Q. How do you arrive at your standard of five hundred dollars a front foot for that property?

A. Probably that is a matter of education.

Q. There should be a reason for it.

A. The reason is obvious. In your various transactions
73 with real estate throughout the city of Philadelphia you form conclusions, and you form the basis of conclusions probably, from other values. There is this kind of intuitive matter we acquire by instinct.

Q. It comes by intuition?

A. Intuition and education.

Q. It would be regardless of sales in the neighborhood?

A. To some extent. At the same time you have an opinion. As valuer of real estate, you have an opinion of a value. If called upon to state what your value of that property is you state that property is worth so much. That is the only information you can give.

Q. I understood you to say your first examination of this property was eighteen months ago, which was in the middle of 1882, we will take for granted?

A. I suppose so. I cannot specify the exact date I called out there, but I have been there several times.

Q. It was since this elevated road was built and in operation?

A. Certainly.

Q. You never examined property before that, did you, with a view to forming any estimate of its value?

74 A. No, sir.

Q. It is by intuition you judge that this property, before the elevated road was built, was worth one hundred and fifty thousand dollars, and since that time it is only worth one hundred thousand dollars. Is that what I am to understand?

A. Yes, sir; that is what you are to understand.

Q. Although you never examined it before?

A. Not for the purpose of valuation.

Mr. BIDDLE:

Q. Is a sheriff's sale a fair test of market values?
A. Not at all. You can't tell anything at all about it.

HORACE FRITZ, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

Q. I will put the same questions to you that I have to these other gentlemen as to their business and how long they have been engaged in it?
A. I am a conveyancer and real estate agent, and have been so for over twenty-four years.
Q. You have been actively engaged in this city, have you not?
75 A. Yes, sir.
Q. Part of your business necessarily is to ascertain the values of property for sale and purchase and investments on mortgage?
A. Yes, sir.
Q. And I presume, as these other gentlemen, you have been employed also as expert or valuer, have you not?
A. I have.
Q. Do you know this property at 23rd and Filbert?
A. Yes, sir.
Q. How long have you known it generally, first, and then specifically?
A. Generally for several years and specifically for about probably eighteen months; the latter part of 1882 or the early part of 1883.
Q. About when did you first visit it with special reference to valuation?
A. It was either in the fall of 1882 or spring of 1883.
Q. Will you state to this jury first what you thought its value was, or is at the present day, apart from and supposing the elevated railroad does not run as it does?
A. I would value that property without the elevated road
76 at one hundred and fifty thousand dollars, including the ground and buildings.
Q. What would you put the ground at?
A. At five hundred dollars a foot front on 23rd street.
Q. And the buildings would make up the difference?
A. Yes, sir; they would make up the difference.
Q. I understand you put it as Mr. Barry does—the land one hundred and fifteen thousand dollars and the buildings thirty-five thousand dollars?
A. I would.
Q. State what depreciation, if any, in your judgment, is caused by that structure, taken into view all the consequences of the structure, as well as the existence of the structure itself, its existence, and its use?

A. In my judgment, it has depreciated from twenty-five to thirty per cent.

Q. What are the elements of depreciation, in your judgment?

A. The deprivation of light to this building, the noise, the vibration, dust, and so forth.

Q. You heard what Mr. Barry said about a sheriff's sale as a test. Do you agree with that or not?

A. Fully.

77 Cross-examination by Mr. Fox:

Q. As a real estate expert, do you or do you not form a judgment based upon sales?

A. Yes, sir; to a certain extent.

Q. Private sales and public sales, after due advertisement and notice?

A. Yes, sir.

Q. Where they are open to competition, bidders, and so on?

A. Yes, sir.

Q. Not strictly forced to sell?

A. Certainly not.

Q. You said that you examined this property eighteen months ago?

A. About that time.

Q. Was the road built at that time?

A. Yes, sir.

Q. You had never examined it before that?

A. Not critically. I knew of the property being there.

Q. You knew of the Girard Tube Works being there?

A. Yes, sir.

Q. What is your standard of value for placing this property at five hundred dollars per foot front for the ground?

78 A. By reason of its location and the facilities afforded to this property for the specific business to which it was adapted, and generally the advantages accruing to it by reason of its location.

Q. If the business for which this property was adapted could be conducted there to-day with the same facility, or, perhaps, better—if we could show that, would you still believe that the property was injured to the extent of twenty-five or thirty per cent.?

A. No, sir; not if the same facilities could be afforded that they enjoyed prior to this road being there.

Q. How much of this building touches the building line of Filbert street?

A. I can't say for a certainty. The entire lot is four hundred and twenty-six feet and extends to the River Schuylkill. All of the building does not come up to the line of Filbert street.

Q. What proportion—one-half, one-third, or one-fourth?

A. No; I don't suppose, speaking of the true correct line on Filbert street, there is more than about forty feet.

79 Q. The plan shows it is sixty-five feet; so that the ques-

tion of light reduces itself merely to the question of the light through that "L" building, does it not?

A. No; not necessarily.

Q. How far is the main building from this elevated structure?

A. Well, I couldn't answer that question.

Q. You don't know?

A. No; I couldn't give you an intelligent answer as to that.

Q. It would be a guess?

A. Yes, sir.

Q. How long has it been since you have known any occupation of that industrial establishment whatever?

A. I can't answer that question.

Q. You say you have known it some time?

A. Yes, sir.

Q. How long have you known it?

A. I have known the building being there for eight or ten years.

Q. In that time has there been any occupation of it?

A. Yes, sir.

Q. How long before that eight or ten years?

80 A. I can't answer that; I am not sufficiently acquainted with the building. I couldn't give you a positive answer. I know it has been idle for some time; I can't say how long.

Q. Has it been idle five years?

A. I should judge fully that.

Q. Six years?

A. Possibly; but I can't give you any intelligent point.

Q. From a point at which the Filbert-street road was not, so far as you are concerned or know, being erected or in contemplation, long before this road was built?

A. Yes, sir.

Q. What is the size of the old Masonic Hall?

A. The lot is one hundred and one feet front by one hundred and seventy-eight feet deep.

Q. Situated on Chestnut street between Seventh and Eighth?

A. Yes, sir.

Q. Running back to another street?

A. Jayne street.

Q. How would you compare the relative value of that property with the Girard Tube Works?

81 A. Well, I should not consider it a fair comparison at all; one being adapted for a certain purpose and the other for something entirely different; in other words, the Masonic Temple would not have suited if it was on the banks of the Schuylkill.

Q. Masonic Hall is situated on Chestnut street, between 7th and 8th, and contains one hundred and one feet front, one hundred and seventy-eight feet deep, and it sold for how much?

A. Two hundred and twenty-five thousand dollars.

Q. A fair sale?

A. A fair sale.

Q. A private sale?

A. Yes, sir.

Q. Not a forced sale in any sense?

A. No, sir.

Q. How, relatively, does that value and that property, situated as it is, compare with the Girard Tube Works as a piece of property, situated where it is?

A. I can't answer that. As I said a moment ago, the purposes are so entirely different. This property—the Girard Tube Works—the location is admirably adapted for its special business. The location is valuable in itself for that special purpose.

82 Q. Is the Girard Tube Works worth as much, as a merchantable article, as the Masonic Hall?

A. No; I think not.

Q. Is it worth half as much, as a merchantable article?

A. Possibly.

Q. Can you say it is, as an expert—I mean without regard to the railroad before the railroad was there?

A. Well, I think it is.

Q. You think it is worth half that?

A. Yes, sir.

Q. Do you know the large lumbering mill on the connecting railroad west of Broad street—Blanchard's?

A. Yes, sir; I know something of that.

Q. You have had something to do with the sale of that, I think?

A. Yes, sir.

Q. Having had something to do with that—with their purpose and otherwise—what was the particular motive in locating right there?

A. The facilities of the railroad.

Q. Do you live in Germantown?

A. I do.

Q. Do you know how the railroad has been crowded with manufacturing and storage properties?

A. I do.

83 Q. What would be the value of the properties, taking them generally, if they were moved from their railroad connections altogether? Mr. Gummey has already said the land would be worth the same. The industrial establishment itself, for the purposes for which it was designed, what would that be worth taken away?

A. There is a difference as to industrial establishments. With some railroad facilities are absolutely necessary; with others it does not make so much difference. Where the railroad facilities are necessary to it I do say that the location on the line of the railroad increases the value of the property.

Q. Whether necessary or not, is not a railroad connection, as a general rule, a matter of benefit to industrial establishments—to those such as work in iron and other heavy material?

A. As a general thing; yes, sir.

Redirect examination — Mr. BIDDLE:

Q. You have been asked several times about a railroad connection. Do you know of any railroad connection or facilities that this company has offered to this building?

84 A. No, sir.

Q. Did you ever hear of any?

A. Never.

KATE SOLOMON, having been duly sworn—

Mr. MacVeagh asks what plaintiffs propose to prove by this witness in reference to the property in dispute.

Mr. TODD: We propose to prove that this lady is a resident on the line of Filbert street within a square of this property, and what annoyances result from the operation of this elevated railroad in front of the house in which she resides, and, generally, how the road is operated and how it is conducted.

Mr. MACVEAGH: A dwelling-house?

Mr. TODD: Yes. How the road is conducted; the cinders, dust, dirt, and falling pieces from the track, making it dangerous to passers-by, and emitting the hot water from the boilers and danger arising from fire, and all the elements that are incident to having such a road alongside your property.

After argument the court stated to Mr. Biddle: "I suppose your purpose is to show by this witness in what manner the road

85 is conducted, as far as the frequency of trains—as far as the dropping of cinders, smoke, and ashes are concerned?"

Mr. BIDDLE: That is it. This property is within a square of the property in question.

Mr. MACVEAGH: Will your honor indicate within what limits this examination is to be conducted?

The COURT: It is not how her property is affected, but how the property in question is affected. The jury might very readily infer how the property was affected from the manner in which the road was conducted a square below.

Mr. MACVEAGH: I say special annoyances, because happenings to her property are not legitimate subjects of consideration here. As to the method of the operation of the road that is legitimate.

Mr. BIDDLE: We will go into general and not specials.

Mr. BIDDLE:

Q. Tell the jury where you live.

A. 2125 Filbert street.

Q. How long have you lived there?

A. I lived there two years and seven months.

86 Q. Then you have seen the trains and heard them pass over this road?

A. Yes, sir.

Q. Give the jury an idea about how often they pass.

A. About every two or three minutes.

Q. Do they go on pretty regularly all the time?

A. Yes, sir.
Q. Do they ever run at night?
A. They run until twelve o'clock.
Q. How early do they begin in the morning?
A. Three or four in the morning.
Q. Do you hear them coming?
A. Yes, sir.
Q. What is this running of trains accompanied by? Tell us without my asking you specially. Tell us what it does, how you hear it, and how you know it.
A. We hear the trains going over, the bells ringing, the smoke, and squirting the water and puffing.
Q. Did you ever see any cinders in that neighborhood?
A. Yes, sir.
Q. Is it just in front of your house that these cinders fall?
A. Yes, sir.
Q. Have you ever gone as far as 23rd or 24th street?
87 A. Yes, sir.
Q. Did you ever see there anything on the ground?
A. I have seen nails and coupling pins.
Q. Give us an idea what the size of one of those coupling pins is. Is it about as long as that (the length of a sheet of foolscap paper)?
A. Yes, sir.

Mr. MacVeagh: I do not think this is evidence as to what she found on the ground there. She has given her knowledge as to how the road is operated. This is as to specific things she found on Filbert street.

Mr. Biddle: This is in front of this property. She said she had been as far as 24th street.

Q. Where did you find them?
A. You asked me whether I seen any laying; I said yes.
Q. Where?
A. Down to 23rd, going to the gas-house.

Mr. MacVeagh: I object to anything she found on the ground.
The Witness: I didn't say I found; I said I seen.
Mr. Biddle: She said she saw coupling pins.
88 Mr. MacVeagh: She didn't say "coupling pins."
The Witness: Yes, sir; nails and coupling pins.

Mr. Biddle:

Q. What do you mean by nails; give us an idea of the size; do you mean a tack?
A. No, sir; I mean a spike.
Q. How large are those nails?
A. I guess they are about that large (indicating width of legal cap); not quite as long as that.
Q. Did you see many or few?
A. When they fixed the railroad there was many on the floor.
Q. You mean above?
A. No; on the street.

ANNIE M. CORNISH, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

Q. Where do you live?
A. 2117 Filbert street.
Q. How long have you lived there?
A. Five years and six months.
Q. Then you lived there before this railroad was in operation?
A. Yes, sir.
Q. Have you noticed any difference since its running?
89 A. Yes, sir.
Q. What?
A. Noise and dirt and fire comes in showers sometimes when the trains are passing.
Q. Anything else?
A. I saw a piece of iron fall.
Q. Where?
A. Right in front—not exactly of me; it was a little on the other side.
Q. What do you call on the other side?
A. The next pavement to where I was—fell on the pavement.
Q. Do you mean west or east?
A. West.

Mr. MacVeagh objects to this testimony as irrelevant.

The COURT: The noise, dust, smoke, and sparks are necessary incidents to the running of the railroad. The falling of spikes and coupling-pins I do not think are. They are separate and distinct acts of negligence, and evidence of them is not admissible in this case.

Mr. BIDDLE:

Q. You have said that you lived in your property before the road was put there and have lived there since, and you are living there now?
90 A. Yes, sir.
Q. Is there any difference, if so, what, in the access of light to your house?

Objected to.

The COURT: It would depend on whether the properties were similarly situated on the railroad.

Mr. BIDDLE:

Q. How near does any part of the road come to the line of your building; is it as near to you as that gentleman (indicating gentleman on first row of jury)?
A. It is just the length of the pavement off us.
Q. You mean the width?
A. Yes, sir; the width.

Q. Does it not lap over the pavement?
A. Yes, sir.
Q. Would it be about from where you are sitting to that gentleman there (indicating gentleman on first row of jury), or from where you are sitting to this gentleman (indicating gentleman in second row)?
A. I think, as near as I can locate, it back to this gentleman (indicating gentleman in second row of jury).

Q. Is there any difference in the light as it was before the
91 road was built and as it is now, so far as your dwelling-house is concerned?

A. Yes, sir; especially in dark weather it is worse; we can't see in the front room then at all.
Q. How is it in ordinary weather; is it any different?
A. Yes, sir; it is pretty dark, too.
Q. I think you said that you had seen sparks and cinders flying from the engines, didn't you?
A. Yes, sir.

MARGARET LYNCH, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

Q. Where do you live?
A. I live 34 North 21st street.
Q. That is close by Filbert street, isn't it?
A. Next door to the corner of Filbert, on 21st.
Q. Of course, it is on the west side?
A. Yes, sir.
Q. You own some property on Filbert street?
A. Yes, sir.
Q. How much?
A. I own three houses there.

Q. Can you give us the numbers, if you please?
92 A. On 2111 and 2105. I don't know the other; it is a stable; it is next door to Mr. Simpson's.

Q. It would be near 21st street?
A. Yes, sir; pretty near; it is between 21st and 22nd.
Q. You know the elevated railroad?
A. Yes, sir.
Q. It runs in front of your property?
A. Yes, sir.
Q. How long have you lived in your property there?
A. Thirty years in that one house.
Q. You have noticed a great difference, haven't you?
A. A great deal. I have lost a great deal of rents in those houses.
Q. Is it more agreeable than it used to be or less agreeable?
A. It is less agreeable.
Q. Why?
A. People wouldn't live in them on account of the dirt and cinders and everything falling down on there.
Q. Do any cinders ever fall?

A. Oh, yes.
Q. Have you noticed any shaking of your building?
A. Yes, sir.
Q. Would you like to keep it there?
93 A. No, sir; not on Filbert street.

Mrs. HAGGARTY, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

Q. Where do you reside?
A. At the corner of 23rd and Filbert—number 33, right on the corner.
Q. How long have you lived there?
A. Over thirty years.
Q. I believe you own that property?
A. Yes, sir.
Q. Has any change taken place at all within the last three or four or five years in that street?
A. Oh, my, a great change.
Q. What is it?
A. From noise and dirt and everything that we get from it.
Q. From what—this railroad?
A. Yes, sir.
Q. This Filbert Street *street* Extension, as it is called?
A. Yes, sir.
Q. What do you get beside noise and dirt?
A. We get cinders sometimes.
Q. How often do the cars run—about?
A. Well, that I couldn't say, but they run pretty often.
94 Q. Do they run about once in an hour?
A. Oh, my.
Q. I want you to give us an idea.
A. I can't tell you. There is a man here can state how many trains there is goes. I can't just exactly say.
Q. Do they run pretty often all the time?
A. Oh, my; they do often. Sometimes there will be three passing at my place at a time.
Q. Going both ways?
A. Yes, sir.
Q. They run in a line?
A. Yes, sir.
Q. Did you ever see just at that neighborhood there—23rd and Filbert—anything different from what it used to be on the street and what it used to be in this road when it was there?
A. I seen a great deal of dirt?
Q. What?
A. I put a new step at my door.

Objected to.

Q. Residing, as you say you have done, for many years at the

corner of 23rd and Filbert streets, in this city, have you ob-
95 served in the streetway under the elevated road, just in this neighborhood, any pins, spikes, or the like?

Objected to by the defendants. Objection sustained. Exception for plaintiff.

JANE BRADLEY, having been duly sworn, was examined as follows:

By Mr. BIDDLE: Where do you reside?
A. 2125 Filbert street.
Q. How long have you resided there?
A. Better than twelve years.
Q. Then, of course, you know the property before the road was there?
A. Yes, sir.
Q. What change, if any, has taken place since the erection of this road?
A. It has dirtied the house and made the house dark.
Q. It produces darkness under the line of the road?
A. Yes, sir; all through.
Q. Are there cinders?
A. There are showers of fire falls down.
Q. Any noise?
A. Yes, sir; perpetual noise, night and day.
Q. I suppose the noise at your house would be very much the same as a square or two away from it?
A. I guess it would. You couldn't hear thunder when it thunders when they are passing.
96 Q. Is there any shaking caused in the buildings along there? I do not speak of your house, but all the buildings.
A. I should guess so.
Q. You mean you think so?
A. Yes, sir.
Q. You said it made the house dark?
A. Yes, sir.
Q. How is it of a dark day; can you see very well then?
A. On a dark day I have got to light a lamp, and all the time I ought to have a lamp in the entry burning, or gas.
Q. How often about—I don't want to know absolutely precisely, for that you couldn't give—how often about do these trains pass in different directions?
A. I think four or five minutes. I can't say positively.
Q. How about talking when the trains are running by; can people talk readily there?
A. You must shut up entirely.

Cross-examination by Mr. MACVEAGH:

Q. This is a two-story dwelling-house?
A. No, sir; a three.
Q. How wide is it?

A. I guess about fifteen feet.
Q. How deep does it go?
97 A. I don't know what is the depth of the house.
Q. Twenty-five or thirty feet?
A. I guess it is.
Q. Fifteen by thirty?
A. Yes, sir.

Mr. BIDDLE:

Q. You own the house yourself?
A. Yes, sir.

WILLIAM RAMSEY, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

Q. Where do you live?
A. Number 40 North 23rd street.
Q. How close to the Girard Tube Works?
A. I live in the building.
Q. How long have you lived there?
A. I have lived there seven years.
Q. You are watchman, are you not?
A. Yes, sir; I am the watchman.
Q. Do you recollect when the road was put up?
A. Yes, sir.
Q. About three years ago?
A. About three years ago, going on four.
Q. What do you know, if anything, about cinders flying from the engines on the trains; you are there all the time, are you not?
A. Yes, sir; I know too much about them——
Q. You are there all the time?
98 A. Yes, sir.
Q. If they had come you would know about them?

Objected to.

Mr. BIDDLE: I propose to ask this witness, What, if anything, do you know about the cinders coming from the trains going in both directions?

Mr. MACVEAGH: I object to that question as irrelevant. He will follow it by asking about fires, particular fires. Whether or not they have happened are not evidence in this case.

Mr. BIDDLE: I haven't asked anything about fires.

Mr. MACVEAGH: The witness will answer and was going on to answer about fires. If not about fires, very well; the ordinary operations of the road are perfectly legitimate. The question is not objected to if the witness confines himself to those ordinary operations and does not state anything about any particular fire or fires happening to this property.

Mr. BIDDLE:

Q. Confine yourself to your knowledge of cinders coming from the trains running east and west; whether they did come or not.

A. I saw them often; and sparks, too.

99 Q. State what you know about cinders.

A. I saw sparks and cinders both; tramped them out in the yard of the Girard Tube Works with my feet.

Q. Is this a frequent or infrequent thing?

A. Plenty in the summer time.

Q. I do not ask of any fires. Is it a frequent thing?

A. It is frequent in the summer time.

Q. Do the trains move at night as well as in daytime?

A. They move pretty regular up to twelve o'clock.

Q. When do they begin in the morning?

A. You can't tell exactly.

Q. Before daylight in the winter?

A. Oh, yes; they are taking out and filling in. There is about two hours in the night they rest very easy.

Q. There are about twenty or twenty-two hours they are moving?

A. Yes, sir.

Q. Their engines are in motion?

A. Yes, sir.

Q. Do I understand you to say that sparks and cinders are coming out the funnels during most of these times when they pass this property?

A. A great many times they do.

100 Q. Without answering as to any specific fact or occurrence, I ask you whether these sparks are the cause of serious annoyance. Do not say what annoyance; sparks and cinders, are they?

A. They are the cause of annoyance and trouble.

Mr. BIDDLE: We have gone up to a certain point without objection. I want to show what the specific occurrences are; not a single isolated fact, but frequent specific occurrences caused by what I have proved has been within this witness' own personal knowledge—not once, not twice, but as a frequent thing to show its effects upon this property.

Mr. MacVeagh objects.

Mr. BIDDLE:

Q. You have spoken of the cinders falling from these engines. I ask you to describe to the court and jury the character of these sparks and cinders.

Objected to; objection overruled; exception for defendant.

Mr. MACVEAGH: I will state the ground of my objection. It is objected to on the ground that the company is not responsible here for the emission of sparks or cinders, unless it is shown that they are emitted by their negligence.

101 Mr. BIDDLE: That is just what I do not intend to show. I want to show the character of the sparks and cinders as an element of deterioration.

Mr. BIDDLE:

Q. What is the character of the sparks and cinders you see emitted from these locomotives?

A. That soft coal that they use for firing up that comes out in red cinders—hot coals—red-hot coals—I saw them drop on the street.

Q. Do you know of your own knowledge what the results of the dropping of these hot coals have been?

The COURT: I think you should show that this constantly happens in the running of the trains and is not an accident.

Mr. BIDDLE:

Q. How often does this happen?

A. I see it different times.

Q. About twenty times?

A. I suppose twenty times or more.

Q. I want to understand that. You say that twenty times or more hot coals have fallen from the engine on your premises?

A. Yes, sir.

Q. Do you mean in one year or since the running of the road?

102 A. Taking the whole thing.

Mr. BIDDLE:

Q. What has been the result as a habit of the falling of these coals in the way you have spoken of?

Objected to; objection overruled; exception by defendant.

A. It has set part of the main building on fire—a portion of it—set coal sheds on fire, and it has set the grass in the yard on fire.

Q. Are you speaking of different times when you say this?

A. Yes, sir; different times.

Q. Then you mean to say that many times the sheds, the main building, and the grass in the yard have been fired?

Objected to.

Q. I will ask you how many times this has taken place, about, to your knowledge?

A. Well, over twenty times. We have had fire twice since the last trial.

Cross-examination by Mr. FOX:

Q. How long have you lived there?

A. I have lived there seven years.

Q. Since you have lived there has there been any use of the buildings whatever?

A. They have not been worked.

103 Q. Have they since 1877?

A. I can't count back seven years. Of course I didn't take note of it.

Q. Seven years is back to January, 1877?

A. Yes, sir.

Q. Don't you know how far back seven years is?

A. I didn't take no heed.

Mr. MacVeagh:

Q. Don't you know how far back seven years is from now?

A. Oh, yes; I could count.

Mr. Fox:

Q. What is the time back—seven years from now? How far back is it?

A. Seven years back.

Q. What year is it?

A. I don't know. I didn't take notice.

Mr. MacVeagh:

Q. Are you there day and night?

A. I live there.

Q. Do you watch it day and night?

A. Yes, sir.

Q. Who takes the other turns?

A. The family, if I am asleep.

Q. Do you go to sleep at night?

A. You can't sleep at night; that is the main time for you to be on.

Q. You don't sleep at night at all?

A. You can't sleep there at night. You are in danger yourself in the place.

104 Q. Does your family live there?

A. Oh, yes.

Q. Do any of them sleep?

A. Oh, decidedly. They go to bed at the usual time and get what rest they can.

Q. You have no other watchman?

A. No, sir.

Q. Who is in your family?

A. My wife and two daughters and one boy.

Q. How many fires do you say there have been to this property?

A. Well, to give a calculation, there have been over 20. I didn't take particular account of them.

Q. How many times was the main building on fire?

A. That portion was once on fire.

Q. Which portion?

A. To the west end, on Filbert street.

Q. The west end, on Filbert street, was only on fire once?

A. Yes, sir.

Q. How often was the part on 23rd street on fire?
A. It never was on—that corner never was on fire.
Q. That is the nearest to the elevated road?
105 A. Oh, no; the one corner is as near to the elevated road as the other.
Q. They are equally near?
A. Yes, sir.
Q. What were the other buildings that were on fire?
A. The coal sheds.
Q. There are coal sheds?
A. Towards the river.
Q. How near the river?
A. They might be about 20 feet out from the river.
Q. And how far from this elevated track?
A. I suppose—well, you know they are on the line of the street.
Q. On the line of Filbert street?
A. Yes, sir.
Q. How often were the coal sheds on fire?
A. I couldn't tell the exact times. I did take day and date for some of them.
Q. Just look at that plot and see if, as a matter of fact, the one end is not nearer the elevated road than the other (referring to same); whether the 23rd-street front is not closer to the elevated road than that main building; what portion of it is it you mean?
A. You asked which portion of the building was on fire,
106 and I said the portion towards the west side of the river.
Q. Show us on that map what building you mean. This is 23rd street and this Filbert (indicating). This is the main office door in here (indicating).
A. Then it is right on the corner of Filbert. It is towards this side (indicating.)
Q. You call that the main works?
A. If you call this the main building (indicating) running along 23rd street it would be on this side (indicating).
Q. This is 23rd street here (indicating).
A. You know the building fronts along 23rd.
Q. As it is 23rd and this is the Schuylkill (indicating), where do you mean; you say the portion at the corner of 23rd and Filbert never was on fire?
A. Yes, sir; but the other corner of it towards the Schuylkill river was on fire.
Q. But that is further from the elevated road than this corner (indicating)?
A. The road run-past them. The gable end is on the line of Filbert street.

Mr. Fox:

Q. That is the part that never was on fire?
107 A. This end of it was on fire (indicating). I won't say that there was fire or none there (indicating).

Q. I ask you whether or not that building is not next to the Filbert street railroad, and the main building is removed from it?
A. No; it is not.

Mr. MacVeagh:

Q. Where are the coal sheds here that you say were on fire?
A. Towards the river. I understand nothing about that map.
Q. They are down here on the building line. Are they out to the building line?
A. They are out to the line on the street—on the sidewalk—as far as they can go.
Q. They were on fire 16 or 17 times, were they?
A. Yes, sir; and more, too.
Q. Did you have assistance to put out more than one of those fires?
A. Yes, sir; often.
Q. Didn't you say in your former examination you got assistance once?
A. Yes, sir; and more than once. I got assistance to put out that fire, you say, on that corner of the building.
Q. Did you ever make a report of these fires?
108 A. I have made out a small report; I thought there was no use in me keeping an account of it.
Q. Did you ever report it to anybody connected with the railroad?
A. No. What was the use of my reporting it to anybody belonging to the railroad?
Q. You never did?
A. No, sir.
Q. How much of the property is burned down?
A. I have made a report about the employés of the railroad breaking the glass of the windows on engine 83.
Q. How much of the property was burned down?
A. We didn't let any of it be burned down; we didn't let the fire get that far ahead; if we had it would have went fast enough.
Q. As a matter of fact there was none burned down?
A. We seen it too soon.

Redirect examination — Mr. Biddle:

Q. I want to understand first distinctly about the shedding. Looking at this photograph, marked "F," I want you to say
109 whether the sheds that were on fire so often were not about there (indicating). This is 23rd street; there is the road running along (indicating); we are going towards the river there (indicating). Is that the part?
A. Yes, sir.
Q. Just where that lamp comes in—I mean on the plan?
A. On the plan; yes, sir.
Q. That light-colored part by the lamp?
A. Yes, sir.
Q. I have understood you to say—but I repeat the question, How

often did these showers of sparks and cinders come? I do not speak of those that set fire, but I mean the general course.

A. Oh, it is a regular thing.

Q. Does it happen every day?

A. Yes, sir; you can see them plainer at night.

Q. Do you mean to say it is a regular occurrence every night?

A. Yes, sir.

Q. You cannot see them during the day, but at night you see them every night?

A. Yes, sir.

Q. Is it constant and unremitting?

A. Yes, sir.

Q. And happens all the time?

110 A. Regular. There come torpedoes off the railroad, and has broken the windows of that building.

Q. You said you did complain about the breaking of the windows, in answer to the question of Mr. MacVeagh?

A. Yes, sir.

JAMES A. BARTLEY, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

Q. You are in the employ of the Pennsylvania railroad?

A. Yes, sir.

Q. In what capacity?

A. Yardmaster.

Q. Where?

A. In Broad street and West Philadelphia, across the elevated railroad.

Q. Including the bridge?

A. Yes sir.

Q. Your jurisdiction is between Broad street and Powelton avenue?

A. Yes, sir.

Q. Kindly tell us how many trains come in and go out every day?

A. The regular trains are about 238 regular loaded trains, and the empties will run it up to about between 450 and 500 a

111 day. That includes the empty trains and engines, the regular movement across the bridge.

Q. That is to say, including loaded and empty trains, and I suppose you include the freight and passenger trains both?

A. Everything.

Q. There would be about 450 trains moving, full and empty every 24 hours?

A. Yes, sir.

Q. Is that counting both directions, east and west?

A. All directions.

Q. Of course they all pass 23rd and Filbert?

A. Yes, sir.

Q. In fact they would pass, I suppose, from Powelton avenue to Broad street?
A. Yes, sir.
Q. The empty trains, many of them, are moved by locomotives, are they not?
A. All are moved by locomoties.
Q. Then the locomotives have all got fire?
A. Yes, sir.
Q. 450 trains a day?
A. Yes, sir.

WILLIAM SIMPSON, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

112 Q. Where do you reside?
A. At present in West Philadelphia, 107 south 34th street.
Q. When did you move there?
A. Between five and six months since.
Q. Where did you reside prior to that?
A. The northwest corner of 21st and Filbert.
Q. How long had you lived there?
A. I think about 29 or 30 years.
Q. Then, of course, you lived there before the "L" was up?
A. Yes, sir.
Q. What was your business?
A. In the carriage-bolt business.
Q. Where is it carried on?
A. 22nd and Filbert, in the southeast corner.
Q. And you are on the other side?
A. Yes, sir.
Q. Then you are pretty near the curve of the "L?"
A. When I was at the corner of 21st I was right at the curve.
Q. Where does it begin to curve? Locate it as near as you can. It is a little west of 22nd street?
A. 21st street it begins.
Q. At 22nd street it gets pretty well into the street, doesn't it?
A. It goes straight along there.
113 Q. From 22nd?
A. Yes, sir.
Q. How much of the pavement do the pillars occupy?
A. I should think about six feet.
Q. Both sides?
A. Not the pillars don't; no.
Q. It occupies the whole pebble-way, cart-way, in the first place? It is over the whole cart-way?
A. It is over the street.
Q. Now, I want to know about how much of the pavement the pillars on each side occupy.
A. I think they occupy about three feet square inside of the curb.

Q. That is, you mean between the building line and the curb?
A. And the curb; yes, sir.
Q. And the structure above stands, as I understand, a little above the pillars on each side?
—. I think it came within about four feet of my bed-room window.
Q. It comes within four feet of the building line, or did as to your own house?
A. Yes, sir.
Q. How often do these cars go? I make it a little over every three minutes. I want your experience of about how often they pass.
114 A. I can't exactly tell. Sometimes there are three going together; sometimes three or four minutes before any would come at all. I think they would average about one a minute, or one in three minutes, anyhow. Sometimes they go more than one a minute.
Q. But the average is a trifle over one in three?
A. Yes, sir.
Q. Are you still carrying on your works there?
A. Yes, sir.
Q. How many tracks are in front of your place?
A. Three.
Q. Tell us what the resultants of the running of the road are. I want your knowledge on the subject. What happens from running this road?
A. It darkens the place so that we can't see, for one thing, and dangerous from fire and hot cinders coming out.

Objected to.

Q. You spoke of cinders, noise, darkening. Is there anything else? Is there any shaking?
A. Yes, sir; a little; not a great deal, the corner I was on.
115 Q. How about ability to hear as between, before, and since?
A. You can wait until a train passes if you want to speak, but you can't while it is going.
Q. But must you wait?
A. Yes, sir; you must wait.
Q. That is what you mean?
A. That is what I mean.
Q. You have been in the business there for a length of time; about how long?
A. I have been in business there over 30 years.
Q. In this carriage-bolt business?
A. No, sir; I was in another business.
Q. How long in the carriage-bolt business?
A. I think about 14 or 15 years.
Q. And before that?
A. I was nail-making.

Mr. BIDDLE:

Q. Do you know of any parties in this neighborhood that have been obliged to offer their property for less than they held it at since this road has been up?

Objecto- to. Objection sustained.

116 Q. Has your property or the property in the neighborhood been injured by dampness from the water falling from the engines? Has that been a cause of injury to your property?

Objected to.

Q. Is the water habitually coming from the boiler in the passage of the engines up and down the road from the river as far as 20th street?

A. Yes, sir.

Q. What is the effect of that water?

A. If you happen to be under it you get wet.

Q. Does it make the approach to the house more or less agreeable?

Objected to.

Q. Does it strike the walls of the building?

A. No; I don't think it strikes the walls of the buildings; it strikes the pavement.

Q. Has the striking of the pavement by the water any effect upon the walls of the buildings or the houses in the line of the road from the River Schuylkill east as far as 20th street?

(Objected to. Objection sustained.)

GEORGE W. KRAFT, having been duly sworn, was examined as follows:

By Mr. BIDDLE:

117 Q. You have been a manufacturer for many years, have you not?

A. I have, sir.

Q. What business?

A. In the iron business.

Q. What particular business? Is it making of bolts, or rails, or what?

A. No, sir; my business has been for the purpose of constructing iron works for gas works all over the country.

Q. Gasometers and gas meters?

A. Yes, sir.

Q. Where is your place of business?

A. At 2132 Filbert street is the office. We occupy nine lots there; from 2116 to 2132.

Q. Then you run very nearly up to 22nd street?

A. Within about 56 or 57 feet.

Q. That would be a frontage of probably over 100 feet?
A. 144 feet.
Q. How far north do you run with your establishment?
A. I am on the south side of Filbert street. I go south.
Q. Do you run back to that alley? I forget the name of it.
A. I do; at intervals; not all of it. I run through several lots.

118 Q. Of course you have been there a number of years?
A. Since 1865.

Q. That is 19 years, now. You have been there, of course, before the road was erected?
A. Yes, sir.
Q. What have been the results—I do not speak of your property, but what has happened since this road has been put there? Is it annoying or pleasing?
A. It is to me very annoying.
Q. What is it? What happened from it?
A. On account of the destruction of light, the want of air, the want of proper solid foundation, or rather the vibration of the earth, causing a shaking of the building, and the intolerable noise.
Q. You have not spoken of cinders?
A. No, sir. Cinders don't trouble me much.
Q. We have got the trains up to 450, full and empty, pulled by engines with fire in them; that, of course, is very often. Does the noise caused by the running of these trains full and empty affect you agreeably or disagreeably in your business?
A. Very disagreeably, indeed.

119 Q. What does it cause?
A. It destroys all opportunities of conversation. In fact, the noise is so intolerable that a man can hardly hear himself think.
Q. It affects your nerves?
A. It affects my nerves; certainly, it does.
Q. Then as to light. It is as high, I suppose, with screens, where there are screens, as the ordinary structures there.
A. I have no screens in front of me, but my northern light is all destroyed.
Q. It occupies about as much of the pavement and street on the other side as on your side, doesn't it?
A. Yes, sir; I should think it did.
Q. You have spoken of shaking or vibration. Tell us how about that.
A. Well, sir, that is very annoying. It not only prevents anything like plain drawing in my establishment, which is a part of my business, but if you were standing on the pavement in front of my establishment talking to a friend you can scarcely keep yourself steady; you must keep silent and quiet until the trains have gone by. The effect on my nervous system is very great.

120 Q. Have you ever seen any articles, light or heavy, coming down from the elevated railroad through the cracks or through the openings onto the pavement or cart-way along

the line of that road east of the River Schuylkill; and, if so, what? I mean heavy articles. I mean bolts, couplings, and the like; things that would hurt when they fell on a man or woman.

Objected to. Objection sustained.

Q. You have already spoken of the difficulty of drawing?
A. Yes, sir.

Plaintiff's close.

Defendant's Evidence.

HARRY F. WEST, having been duly affirmed, was examined as follows:

By Mr. FOX:

Q. What is your business?
A. President of the Philadelphia Warehouse Company.
Q. Did you ever bear any relation to the Girard Tube Works?
A. I was the assignee of the Girard Tube Works at the time of their failure.
Q. What time was that?
A. I was appointed assignee on the 7th of August, 1875.
Q. At that time this property was included in the assignment, was it?
A. Yes, sir.
121 Q. What efforts were made to dispose of that property?
A. We made several efforts to dispose of it. The first one was at Thomas & Sons' sale, somewhere about the 25th of April, 1876. At that time the creditors objected to the sale and brought in a petition to postpone it. It was postponed at the creditors' request for another month. It was then put up at Thomas's sale and it was sold to Mr. Henry G. Smith, attorney, if my recollection serves me, for I think it was about between $60,000 and $70,000. Directly after that sale some parties brought suit on a mortgage that they held on the property.

By Mr. BIDDLE:

Q. You do not say what took place; you said it was sold to Mr. Smith; you seemed to stop there.
A. I did stop there, because Mr. Smith objected to taking it afterwards. He objected to take the property.

By Mr. FOX:

Q. Had he paid anything on account?
A. He had paid $500 on account.
Q. Did he get that back?
A. He got that back again.

Mr. BIDDLE:

Q. Did he not take the property?

122 A. No, sir. He wouldn't take the property. He objected to take *to take* it, and it was then put up at sheriff's sale and offered on the first Monday in June, 1876. At that sale it was purchased by Mr. Theodore F. Jenkins, as attorney for Seyfert, McManus & Company, or Mr. Maize, of that firm, according to this statement. That purchase, I think, was $60,500. Mr. Maize objected to take the property also, and had paid a certain amount at the sheriff's sale; I don't know how much. He objected to take the property, and it was left over again. We had to put it up once more on the 1st Monday in July. The first Monday in July it was sold at $50,000 to Mr. Scully, of Pittsburgh. Mr. Todd bought it for Mr. Scully, of Pittsburgh.

Mr. Fox:

Q. That would be subject to the ground rents?
A. That would be subject to the ground rents—yes, sir.
Q. The ground rents amounted to how much?
A. It is in the deed. I am at a loss. I can't remember that at all.

Mr. Biddle: $12,580 it was.

Mr. Fox:

123 Q. At the time of the two public sales—I do not speak of the sheriff's sale, but of the sale by Thomas & Sons—what took place?

Mr. Biddle: I want to know what you mean by that.

Mr. Fox: What I mean to ask is this: Was the usual strenuous effort made to sell the property at that sale as it was at the second sale?

The Witness: It was advertised very thoroughly, and every creditor and, as far as I can recollect, all real estate dealers had handbills. I saw to them myself at both sales.

Mr. Fox:

Q. You said that on the petition of the creditors you postponed it for one month?
A. Yes, sir.
Q. Believing there would be a sale of the property?
A. They believed it, and I took their view of it.
Q. The creditors were notified of the second sale also, and also of the sheriff's sale?
A. The creditors were notified of the second sale and also of the sheriff's sale. All the creditors had notice of every sale.

124 Q. How many creditors were there? Where were they? What kind of people were they? They were not laborers?
A. I suppose there were about 125 creditors.
Q. Were they people who would be likely to buy a property of that kind?

(Objected to.)

By Mr. McVEAGH:

Q. What was the general character of the creditors to whom these notices were sent?

(Objected to as irrelevant.)

Mr. McVEAGH: I want to show that the creditors were persons largely engaged in the iron business.

The COURT: What is the question?

Mr. McVEAGH: Please state the character of the creditors to whom notice of these different efforts to sell this property were sent—that is, whether they were or not persons engaged more or less in the iron business and persons liable to bid for such a property?

(Objected to as irrelevant.)

Mr. McVEAGH: I propose to follow the question with another as to whether these men were creditors to a considerable extent and depended for the results of their claims largely on the value of this property, so as to show that it had very fair consideration in
125 the way of an effort to get its market value. What I do want to prove is that the utmost publicity was given to this effort to sell this property among the class of people likely to bid for it.

(Question admitted.)

A. The majority in amount of creditors was composed principally of men like Seyfert, McManus & Company and Phillips, Merrick & Company, of Pittsburgh, and large iron manufacturers out there. The majority were in Pittsburgh, if I recollect right, &, with the exception of the banks, they were in the iron manufacturing business. If I recollect, the first bid at sheriff's sale was made by Mr. Maize, who represented Seyfert, McManus & Company. The second bid at sheriff's sale was by Mr. Todd, for Pittsburgh people.

By Mr. FOX:

Q. What were the bids at Thomas' sales?

A. I can't tell you what the bids were. At the first sale my impression is it was a little over $60,000—a trifle over $60,000. It was bought by this Henry G. Smith, the attorney, as he said, for a gentleman in Troy, Mr. Dolan.

By Mr. McVEAGH:

Q. An iron manufacturer?

A. I don't know.

126 Q. Was this property a considerable asset in proportion to the other assets at the time?

A. Yes, sir; it was considered quite an important item.

Cross-examination by Mr. TODD:

Q. In referring to the sheriff's sale you refer to the property of 150 feet front on 23rd street and running west along Filbert street?

A. What is called the main property.

Q. You do not refer to the 77 feet north of the main property?
A. That was called the north lot.
Q. And that was not included in the sheriff's sales to which you have referred?
A. No; it was only the main property the building is on.

By Mr. Fox:

Q. Was not the whole property included in the sale at Thomas'?
A. Yes, sir.
Q. And the north lot was vacant?
A. The north lot was vacant. It had on it a wreck of a building which they called an ice-house. There was nothing material.
Q. Of no value at all?
A. No; it wasn't worth a hundred dollars.

127 By Mr. Todd:

Q. Are you quite certain that the north lot was included in the Thomas & Sons' sale?

(Hand-bill of assignee's sale shown witness.)

By Mr. Todd:

Q. If I understand you correctly, all that was offered at the sheriff's sale and at Thomas & Sons' was what you denominated the main lot, 153 feet on 23rd street and 400 and odd feet along Filbert street, but did not include the lot north of that, 77 feet front and running to low-water mark?
A. No; it did not.

By Mr. Fox:

Q. Did that sale include all the machinery that was in the buildings?
A. No; not all the machinery; it included all the fixed machinery.
Q. Just state what it included.
A. Buildings, machinery, steam-engines, boilers, etc. All the fixed machinery was sold with the property.

Craig D. Ritchie, having been duly affirmed, was examined as follows:

By Mr. Fox:

Q. What is your business?
128 A. My business is that of a conveyancer. *A.* I am now president of the Real Estate Title Insurance Company.
Q. How long have you been a conveyancer?
A. Since 1852.
Q. In that time you have had something to do with real estate negotiations and values, have you not?
A. I have.
Q. To what extent?

A. I have been in active practice since 1852, a period of over thirty years, more especially in lending money upon real estate.

Q. And have been called upon to testify frequently as to the values of real estate as an expert?

A. I have been called upon a number of times for various parties.

Q. Do you know the property known as the Girard Tube Works at 23rd and Filbert street?

A. I do.

Q. The lot containing 232 feet on 23rd street, extending in depth to the Schuylkill river—what, in your judgment, was the market value of that property in 1879, before the Filbert Street Branch was constructed?

A. My idea of it is that it was then worth somewheres about $75,000 to $80,000.

129 Q. What was its value in 1882, after the construction of the railroad and its operation?

A. I think the value is less now than it was then. The buildings have been idle that much longer and worn out that much more.

Q. And to that extent it has deteriorated in value?

A. I think so.

Q. Has that effect been hastened by the construction of the elevated railroad, in your judgment—the wearing out of buildings and those things?

A. That would be very hard to say. The trains passing with a jar, what effect that jar has on them I don't know.

Q. Has there been a depreciation in the market value of that property occasioned by the construction of the elevated railroad?

A. I don't think the elevated railroad has hurt that property to any very perceptible extent. It is a factory property and would always necessarily be a factory property. In the neighborhood where it is located dwelling-houses and stores would never go, whether the railroad was there or whether it was away. The railroad

130 obstructs the light somewhat on the South Extension, but I don't think far enough to do it any damage, because the building whose light is obstructed on the southern end has windows both on east and west fronts and consequently receives enough light even if the southern windows were entirely closed up. There is a noise made by the railroad by the frequent passage of trains and a jar, but the noise and jar would not, I suppose, be perceptible at all in running a factory in regular order.

Q. That is, if the building itself had been in full operation it would not be perceptible?

A. The noise and jar of the factory itself would cause that of the railroad trains not — be noticed. The place has been vacant since before the Centennial and the buildings have been constantly depreciating in value, until now some of the buildings on the west end—sheds, and so forth—are almost tumbling down.

Q. As a conveyancer let me ask you whether or not there is in — profession a custom, or rule, in fact, as to the loaning of

131 mortgage moneys upon manufacturing properties—how that

differs from the loaning of money on store property and dwelling--houses?

A. It is always more difficult to obtain money in a mortgage loan upon a factory than upon a store or dwelling-house. There are a number of reasons. One is oftentimes that it is impossible to obtain a perpetual insurance. Another reason is that factory properties vary in value. In case of the parties who are conducting it failing in business or going out of business properties will very often lay idle for a very long time before they can be turned over, and the mortgagee, unless the margin was enormous, would probably have to buy the property at sheriff's sale. If he had a store or dwelling-house he would have a dozen customers where he would not have any at all for a factory.

Q. During the last fifteen years when did real estate in Philadelphia reach its highest value?

A. Somewhere about 1870 or 1871; some little time previous to the failure of Jay Cooke, which took place in 1873.

Q. What effect did the failure have upon the market?

A. All real estate became dull. It participated in the fall
132 of values other securities had and it went down in value. The Centennial gave a fictitious impulse to the values of real estate in the 24th ward, but not generally in the city, and it continued to depreciate until the fall of 1880 or spring of 1881, when, I think, it was at its lowest notch. Since then it has been gradually rising. I know that building, for instance, was never so cheap as it was at the end of the year 1880, for I was myself building at the time and know about the contracts.

Q. Properties which had full advertisements in the Legal Intelligencer, &c., and notice to purchasers and brought $70,000, say, in 1876, what would be the effect on the then values in the market of that property in 1879 or 1880?

A. I don't think it would be worth any more in 1879 or 1880 than in 1876. I think the general tendency of property was downwards.

Q. And that continued until 1880?

A. Until the fall of 1880. That is my judgment.

Cross-examination by Mr. BIDDLE:

Q. You know a great deal about values, of course, and I want to understand you distinctly. Do you mean to say values
133 generally in the best parts of Philadelphia were higher in 1870 and 1871 than they are now?

A. I stated that the highest time in the fifteen years previous, in my judgment, was about 1870 or 1871. They perhaps declined after Jay Cooke's failure until about the fall of 1880 or spring of 1881, when they began to rise. In the central parts of Philadelphia, like Chestnut street and Market street, they fell comparatively little, and for the last two or three years have been rising very rapidly.

Q. That is an approach, but it is not quite up to what I want to know. Are or are not values in Philadelphia, in Market and Chestnut

streets, at this moment—the beginning of 1884—as high or higher than in 1870 or 1871, or the reverse?

A. I think they are higher; decidedly higher.

Q. Then, taking a period of fifteen years from now, 1884 is better than 1870 and 1871 as to certain localities?

A. As to certain localities, undoubtedly.

Q. How far is Filbert from Market street?

A. Three hundred and six or seven feet.

Q. Practically it is about 300 feet? It is about three-fourths of a Philadelphia square?

134 A. Yes, sir; of a Philadelphia square east and west.

Q. You say that in your judgment this property was only fit for a factory. That dwelling-houses and stores you considered as practically, for a long period of time, out of the question. Could it not be used for many other factory purposes than for making bolts and tubes and things of that kind?

A. I see no reason why it should not be used for other factory purposes.

Q. Could it not be used for a cotton factory?

A. It depends entirely on the machinery.

Q. If a proper structure were erected on that lot is it not adapted to a cotton factory?

A. I don't know enough about the internal arrangements of factories to give my opinion on that point; but the lot is large enough to accommodate cotton, or woolen, or iron, or paper factories—whatever they choose to put on it.

Q. All the natural elements, apart from this road, were there before this road was built to enable anybody that put the proper structure up to run a cotton factory, a woolen factory, a paper

135 factory, or a watch factory, were they not? That is, room, light, air, and access?

A. Yes, sir; it only lacked one thing.

Q. What was that?

A. Transportation. Chestnut and Market street bridges cut off all water transportation, except by canal boats, and there was no railroad transportation. Everything previously, whether light or heavy, had to be hauled to and fro.

Q. Supposing it had been a watch factory?

A. No; I think watches are portable enough to be carried away in wagons.

Q. You have seen the large watch factory in the neighborhood of Jersey City?

A. The outside I have.

Q. Would or would not the liability to conflagration affect a paper factory, a cotton factory, or a woolen factory? Would a man purposely put a paper or a cotton factory where there was a chance of its taking fire twenty times in a couple of years?

A. I should suppose not; I should not.

Q. You have been a builder?

A. Not building for other people; only building for myself dwelling-houses.

Q. You do not know about any facilities that this road has offered to the owners of this property, do you?

136 A. I don't know whether they have offered any or whether they will give any; I know nothing on that subject.

Q. Do you know the contrary?

A. No; I do not; I know nothing.

Q. Could you estimate or approximate the value of such facilities to this property by a direct connection?

A. I don't know that I understand the question.

Q. I mean, supposing there was a direct connection from this property to the elevated railroad, could you approximate to its money value?

A. I don't think I could approximate to its money value. I think, however, that if they had a railroad connection to enable them to ship in the raw material, whether iron, or cotton, or wool, or paper, and ship out the finished product that the property would be more likely to come into the market than it is now, when it has no such railroad connections and no shipping facilities whatever, being cut off by the two bridges below.

Q. Then, without this facility, you would think there would be a depreciation? You have said that such a facility would more than overcome any depreciation. Now, supposing there was no

137 such facility by way of connection, I infer and I wish to know whether my inference is sound--that you think there would be a depreciation, looking to its multifarious possibilities, of use for other purposes that iron tube works or large heavy matter of that kind?

A. I think this: That no person would be as likely to purchase or rent a large property alongside of a railroad where the trains were passing backward and forward and where no facility whatever would be granted. They would be less likely to purchase such a property than another property along a railroad where a facility was granted.

Q. In other words, the market would be restricted; the number of purchases would be restricted?

A. The purchasers would be restricted; yes, sir; in one sense by the effect of the railroad being there, but it would not be materially restricted for this reason: That the number of purchasers for property of that kind is always a small number, and the fact that these works have lain idle, unrented, unsold, for at least a half dozen years before the railroad commenced operations at all there is evidence to my mind that the works are not in demand, either owing

138 to their situation or the character of buildings on them or for some other reason; I can't tell what.

Q. In answer to their lying idle I think you have said that since Jay Cooke's failure down to the end of 1879 there has been a very steady depreciation and depression in the real estate market, did you not?

A. I said there had been.

Q. You think it had touched its lowest notch, and, of course, it

must have been going up since, for you think that in certain localities it is higher than in 1870 and 1871?

A. The depression in some localities has continued to proceed and is still continuing.

Q. Such as where?

A. Take Third street between Arch and Vine, it is not worth as much as it was three years ago and very much lower than it was fifteen or twenty or twenty-five years ago; second street the same way.

Q. Second street and perhaps Front street, too?

A. Front street I know very little about and I wouldn't like to say, but I can speak confidently about Second. Take Market street west of the public buildings, it has not improved a particle.

139 It has improved very greatly between the new public buildings and the new post office.

Q. I believe Market street, west of Broad street, is comparatively very near to the elevated road?

A. The north side is comparatively near to the elevated road, and the only purchases made on that side are purchases made on behalf of the Pennsylvania Railroad Company. On the south side of Market street, which is separated not only by 180 feet from Market to Jones, but by 100-feet width of Market street. The dullness is the same as it has been since the memory of man runneth not to the contrary.

Q. It has always been so?

A. Always.

Q. The Pennsylvania road have been purchasing largely west of Fifteenth street on Market street?

A. I understand they have been purchasing considerably.

Q. You know?

A. I know; yes. How largely I don't know.

Q. You have valued for them?

A. I valued four properties for them, I think.

Q. Large or small?

140 A. Twenty feet front and 180 feet deep to Jones street.

Q. That is the whole width of Market street?

A. They run from Market street to Jones and twenty feet wide on Market street.

Q. They run from Filbert to Jones?

A. No, sir; they run from Market to Jones.

Q. The properties you valued for their purchase run from Market to Jones?

A. The railroad runs from Filbert to Jones.

Q. So that they meet?

A. They meet; they will obliterate Jones street.

Q. You have attended to their business as a valuer and referee generally since this road along the line of the road?

A. I am sorry to say I have not. I have been summoned in some ten or twelve properties, and that was all.

Q. Have you not acted as referee in some of the Filbert-street purchases?

A. I did on Filbert street from 21st to 22nd. That is the only case. I should be very glad if they had employed me oftener.

By Mr. Fox:

Q. You were asked how far Filbert street is from Market
141 St. after having testified as to the increasing value of property on the north side of Market street. I think you testified 300 feet?

A. Yes, sir; the actual distance is three hundred and six or seven. Arch and Market runs 306 and the other is 307, and I forget which is which.

142 *Deposition of Abraham Ritter. Read on the Trial.*

C. P. No. 2. June Term, 1881.

GEORGE R. DUNCAN
vs.
PENNA. R. R. Co. } No. 72.

Deposition of Abraham Ritter, witness called on behalf of plaintiff in the above-entitled cause, on four hours' notice to the other side.

Present: M. H. Todd, Esq., for plaintiff, and Henry K. Fox, Esq., for defendant.

ABRAHAM RITTER, being duly affirmed, deposes and says:

Q. Please state your age, residence, and occupation.

A. I am fifty-one years of age; residence, No. 34 South Twenty-first street; business, real estate broker.

Q. How long have you been engaged in the business of real estate broker?

A. About fourteen or fifteen years in the city of Philadelphia.

Q. What experience have you had in estimating values of real estate in Philadelphia?

143 A. I have sold and bought real estate in almost every portion of the city of Philadelphia, and am constantly called upon to value real estate for trust and insurance companies, and have acted as an expert in the valuation of real estate for fire and life insurance companies of the city of Philadelphia for the insurance commissioner of the State.

Q. What is the present condition of your health?

A. I am entirely unable to attend to business, suffering from a surgical operation recently performed. An abscess at the neck of the bladder prevents my going out to attend to any business.

Q. How long have you been confined to your house?

A. About two months and a half.

Q. Do you think your health is now in condition to permit your going to court to give your testimony?

A. It would be utterly impossible.

Q. Have you examined the property of Mr. George R. Duncan at Twenty-third and Filbert streets?

144 A. I have been over it two or three times with a view of ascertaining the damages and at the request of Mr. Todd.

Q. Will you be kind enough to tell us what, in your judgment, was the value of that property in the fall of 1879, and immediately before the erection of the elevated railroad on Filbert street in front of it?

A. Will you state the size of the property you are asking me about?

Q. The property in question is 231 feet on the west side of Twenty-third street and extends in depth along the north side of Filbert street to the River Schuylkill, about 420 feet. The buildings you are familiar with from having examined them, I believe; are you not?

A. I did not go through the buildings, but examined them very carefully from the exterior; I am familiar with the whole property from my personal examination.

Q. Be kind enough to state what, in your opinion, was the value of that property, of the size heretofore mentioned, immediately prior to the erection of the defendant's elevated railroad on Filbert street?

145 A. I considered it worth $125,000—the whole property, including the improvements.

Q. What proportion of the $125,000 did you place upon real estate and what upon buildings or improvements?

A. I should say about $25,000 to $30,000 on the buildings; the balance on the ground.

Q. Be kind enough to give us what, in your judgment, the property was worth less, if anything, after the elevated railroad was built upon Filbert street in front of this property?

A. In my judgment the property was worth one-third less, or a depreciation of $41,666.66 from its market or commercial value.

Q. Be kind enough to state to us, as you can, what facts you base this opinion on and how you arrive at this conclusion.

A. First cutting off the Filbert-street front; so that is unavailable for building upon as a front, making the property practically an inside lot. The noise, smoke, and other objectionable features, such as the shaking, resulting from the elevated railroad,

146 would make it unavailable for any manufacturing purposes, and entirely unavailable for any dwelling-house.

Q. Then these facts, in your judgment, lessen the market value one-third, if I understand you correctly?

A. They do.

Cross-examined by Mr. Fox:

X Q. When did you first examine the Girard Tube Works with a view to forming an opinion upon this question?

A. The first time was in the latter part of 1882. My examination then was not as complete as I desired, and the second occasion was in February or March of this year. I extended my walk around the entire property, and made a careful examination of the whole thing.

X Q. When were you last there?

A. In February or March of this year.

X Q. On either or both of those visits were you accompanied by experts or others who went for the purpose of estimating the value?

147 A. I went by myself. I was entirely alone on both occasions.

X Q. At the first visit you paid to the establishment with a view to examining its value, was or was not the elevated road in full operation?

A. The first time my recollection is not distinct upon that subject.

X Q. Then I understand you never examined this property prior to the latter part of 1882?

A. At the request of the plaintiffs in this case, I did not, but I had occasion to examine it before the elevated railroad was built or was in process of erection. At the time I was there the foundations for the piers were being put in or were already in partly—the piers for the columns on which the elevated road is built—and I then saw the property before the erection of the elevated road.

X Q. At whose instance was this examination?

A. At my own entirely without a view to damages, and at no person's request. I had a general knowledge of the property before that.

148 X Q. Do you recollect before the elevated road was built the condition of Filbert street from Twenty-third street to the river?

A. Yes; it was a miserable street, used principally for hauling tar away from the gas works, and had a very bad outlook altogether.

X Q. Do you recollect whether there was or was not an high fence and gate on the line of Twenty-third street, cutting off the street from there to the river?

A. No; I do not at the time I was there.

X Q. Was there or not an open outlet from the Girard Tube Works into Filbert street at that point?

A. I really cannot say if there was an opening on Filbert street; the main entrance was on Twenty-third street, however.

X Q. Speaking from your recollection of the property generally, when was it last occupied and into active operation?

(Objected to by Mr. Todd and question withdrawn.)

149 X Q. Upon any one of the occasions when you visited this property were there any business operations going on?

A. There were not. I remember the Girard Tube Works being at work, but it was a long time ago, many years ago.

X Q. You examined the buildings from the exterior, you say. What appearance did they present to your mind, having regard to what might be termed the length of life and good condition of a manufacturing establishment—I mean the future life?

A. They had a very shabby appearance; appeared to be substantial and to — had some care taken of them, inasmuch as the glass in

the windows was not broken, as is frequently the case, and probably would require considerable money to put them in good condition.

X Q. In the course of your business you have examined other industrial works, iron foundries, and places where standing machinery was in use, have you not?

A. I have.

X Q. Was there not in each and every one of these establishments more or less of noise, smoke, and vibration?

150 A. There always is.

X Q. And would there not be the same at all times while the Girard Tube Works were in full blast?

A. That would be my judgment.

X Q. In your judgment as real estate expert, if the railroad had never been built would the Filbert-street front of 400 feet opposite the gas works, extending from Twenty-third street to the river and comprising this entire wharf property, ever have been used for the erection of dwelling-houses?

A. In my judgment, it would never have been used for the purpose of erecting dwelling-houses.

X Q. What standard of value have you adopted for your estimate of the value of this property?

A. I estimated the property as worth $400 a foot straight through to the river, including the wharf, taking into consideration the fact that it had a Filbert-street front, or I could have subdivided it along the Filbert-street front and arrived at my conclusion by such subdivision in my mind, making the ground worth about $92,000.

151 X Q. This being a manufacturing establishment, if a siding could be made to connect with this property, so as to carry its product on a trunk line, with facilities for distribution to every part of the country, would it *would it* not affect your estimate of the damages?

(Objected to by Mr. Todd, first, generally, and there is no evidence in this cause that any siding has been granted or would be granted to this property from the passenger tracks.)

(Mr. Fox replies that the question, as an abstract question, does not confine itself merely to the availability of a siding from passenger tracks alone.)

A. It would not affect my estimate of value—first, because property having a railroad front, with convenience of siding, in the city of Philadelphia, is not in special demand and does not command a high price; and, secondly, my estimate of damage was largely based upon the fact that this property, which might have been made available for many manufacturing purposes, is now limited to very few by reason of the noise, dirt, smoke, and interference with light resulting from this elevated road.

152 X Q. Are you familiar with the location of the Baldwin Locomotive Works?

A. I am.

X Q. Would you regard the property belonging to that establish-

ment as being quite as valuable if removed, say, five blocks away from their present connection with the railroad?

A. Oh, no; not nearly so valuable.

X Q. Do you know the property of the Midvale Steel Works, at Nicetown?

A. I do.

X Q. Would you esteem that property removed, say, three blocks off from its present railroad connection as quite as valuable as it is at present?

A. I should consider a railroad connection essential to both the Baldwin Locomotive Works and Midvale Steel Works, their business being such that a railroad front is essential.

X Q. Do you know the factory of Thomas Potter, Sons & Co., at Second and Erie avenue?

A. Yes.

X Q. Would you think this property, with its present con-
153 nection with the railroad in front of it, would be more or less valuable if placed bodily four blocks away without a railroad connection?

A. I have no knowledge of the business of Thomas Potter, Sons & Co. or how useful the railroad may be to them, but within the past year I have sold a very large number of properties for factory sites, and in only one instance was a railroad front wanted, although I was offering very valuable sites with railroad connections.

ABRAHAM RITTER.

Affirmed to and subscribed to before me the 7th day of November, A. D. 1883.

WILLIAM C. STOEVER,
Notary Public.

154 CITY AND COUNTY OF PHILADELPHIA, *ss:*

I, William C. Stoever, a notary public for the Commonwealth of Pennsylvania, residing in the city of Philadelphia, do hereby certify that on the seventh day of November, A. D. 1883, between the hours of 7.30 p. m. and 9.30 p. m., at the residence of the witness, No. 34 South Twenty-first street, in the city of Philadelphia, the above-named Abraham Ritter, first being duly affirmed to tell the truth, the whole truth, and nothing but the truth, was examined, and his deposition reduced to writing by me in his presence and by him signed in my presence.

Witness my hand and notarial seal this eighth day of November, A. D. 1883.

WILLIAM C. STOEVER, [SEAL.]
Notary Public.

(Endorsed:) 72. June term, 1881. C. P. No. 2. George R. Duncan *v.* Penna. R. R. Co. Deposition of Abraham Ritter, a witness produced on behalf of the plaintiff. Notarial fees, $7.50.

155 *Defendant's Evidence Continued.*

DUNCAN *v.* THE PENNA. R. R.

PHILADELPHIA, *January 15th*, 1884.

Present: George W. Biddle and M. Hampton Todd, Esqs., for plaintiff; Henry K. Fox and Hon. Wayne MacVeagh, for defendant.

JOHN H. BARNES, having been duly sworn, was examined as follows:

By Mr. FOX:

Q. You are with the firm of M. Thomas & Sons, auctioneers?
A. Yes, sir.
Q. And the real estate auctioneer of the firm?
A. Yes, sir.
Q. What is the principal business of your firm?
A. Selling real estate, stocks, furniture, all personal matters.
Q. Did you in the course of your business ever offer for sale the Girard Tube Works?
A. Yes, sir.
Q. How often and when?
A. Twice. The first was April 25th.

By Mr. BIDDLE:

Q. What year?
A. 1876.

By Mr. FOX:

156 Q. Explain right there what your method of offering properties at public sale is; how you advertise them, and so on, and what you did in this case.

Mr. BIDDLE: I object to the method. What he did in this case I do not object to.

By Mr. FOX:

Q. What did you do in this case?
A. We got out hand-bills, posted them on the property and places where we thought they would be of advantage. We also printed it in our real estate catalogue, published every Saturday.

Mr. BIDDLE:

Q. You are speaking of what you did in this particular case?
A. Yes, sir. It was published in the morning papers and the afternoon papers.

By Mr. FOX:

Q. How widely is that catalogue distributed?
A. We send them to the principal lawyers and conveyancers and different institutions, besides those that are called for.

Q. Wherever you think there is a probability of finding a purchaser?

A. Yes, sir.

Q. What date was that?

A. April 25th, 1876.

Q. What was the result of that sale?

A. April 25th? That was postponed until May 23rd.

157 Q. Of the same year?

A. Of the same year.

Q. What resulted then?

A. It was advertised in the same way; hand-bills got out, and went through the same form.

Q. What was the result of that sale?

A. The result was the property was sold for sixty-eight thousand dollars. I take that from our ledger, not from our real estate book, because that was burned; but I take that from the commission we got, that the property sold for sixty-eight thousand dollars.

By the COURT:

Q. When was that?

A. May 23rd, 1876.

Mr. FOX:

Q. Was that all cash, or what was it?

A. The property was subject to incumbrances, fifty-seven thousand five hundred dollars.

Q. Was that the cash?

A. That is the cash. I will explain what I get out of my book. $67,500 from this book was a limit put on it at that time subject to incumbrance, and the incumbrance here is twelve thousand five hundred dollars. That would have been $70,000.

Q. You speak of a limit. You mean to say you were not to sell the property for less than that bid?

158 A. Yes, sir; I say I see from the ledger that it was sold for $68,000, because we have charged $680 commission.

Q. Was that $68,000 entire purchase, or $68,000 subject to encumbrance?

A. That was clear. Where the incumbrances are heavy we charge on everything.

Q. You charge for the whole value of the property, including incumbrances?

A. Yes, sir.

Q. Then the whole value of the property, including encumbrances, at the time was $68,500?

A. Yes, sir.

Q. How long have you been engaged in the real estate selling business?

A. I have been connected with the house over thirty years.

Q. And in the course of that time have sold a great deal of real estate, I imagine?

A. Yes, sir.

Q. You have formed an opinion as to values of various properties that come under your notice?

A. Yes, sir; I am governed by those I sell.

Q. Do you recollect in the course of your sales that prices were or were not affected by depression incident to stringent money markets at times?

A. That I have not paid any special attention to.

Q. You don't recollect?

A. No; I don't pay any special attention to that.

Q. Would your knowledge of real estate warrant you in
159 expressing a judgment as to the value of this property at any time?

Objected to.

Mr. BIDDLE: In the first place, the witness has already told us two things which, I suppose, would disqualify him from pronouncing an opinion. He has told us that his knowledge is governed by the prices he obtained at auction, and then he has told us most distinctly, in answer to a question by Mr. Fox, that he has paid no attention to the change of values in consequence of depreciation from hard times.

The COURT (to Mr. Fox): If you wish to examine Mr. Barnes as an expert you can very readily lay the ground for it.

Cross-examination by Mr. BIDDLE:

Q. What property was it that was sold, as you say, for $68,500?

A. The Girard Tube Works, located at the northwest corner of 23rd and Filbert streets; one hundred and fifty-three and a half feet front by four hundred feet deep.

Q. You did not sell the whole of the property, then?

A. We sold one hundred and fifty-three and a half feet by four hundred.

Q. You have told us, as I understand, on examination-in-chief that you were directed not to sell it unless you got $57,500,
160 with encumbrances, which, of course, is $70,000; yet you say you did sell it for $68,000. How do you explain that?

A. That is just what I was trying to explain. Our real estate book was burned, understand. I took that from the ledger. We charged a commission of $680. That would be one per cent. on the total amount.

Q. That is your knowledge on the subject?

A. That is my knowledge on the subject.

Q. We all know, but I would like you to tell the jury that your premises were destroyed about two years ago by fire.

A. Yes, sir.

Q. Entirely destroyed, I think; burned down to the ground, were they not?

A. Yes, sir.

Q. And you lost, of course, a great many valuable papers, and in

them the memoranda that would have enabled you to answer precisely?

A. Yes, sir.

Q. But you are just drawing an inference from your commission. One per cent. multiplied, of course, by one hundred would give the $68,000.

A. That is the only record we have.

Q. And beyond that you do not know anything?

A. I do not; as to the prices, I mean.

HENRY M. BOYD, having been duly sworn, was examined as follows:

By Mr. FOX:

Q. What is your occupation?

161 A. Attorney-at-law and conveyancer.

Q. How long have you been engaged in this business?

A. About thirty years.

Q. And in that time have you had anything to do with the subject of real estate?

A. I have during the whole of that time operated in it; bought and sold it for myself and for others.

Q. To what extent have you had anything to do with the subject of improving property, building, and so on?

A. I have built about six hundred houses in this city during that time, and also bought a great deal of ground and cut it up into lots and sold it out.

Q. In what sections of the city have you operated?

A. Well, in nearly every ward in the city. Almost every ward, I guess.

Q. Do you know the property known as the Girard Tube Works?

A. I do.

Q. Situated at 23rd and Filbert?

A. Yes, sir.

Q. How long have you known that property?

A. Well, for a good many years. I suppose ten or twelve, any how; perhaps longer.

Q. Did you know it when it was in operation as an industrial establishment?

A. Yes, sir.

Q. And since?

162 A. Yes, sir.

Q. To the present time?

A. Yes, sir.

Q. Speaking from your knowledge of values of real estate, what in your opinion, was the market value of that property in 1879?

A. I think that the ground was worth fifteen dollars a foot, or two hundred and fifty dollars.

Q. $250 capital?

A. $250 capital; yes, sir.

Q. $15 interest?

A. $15 interest is the way we generally count it.
Q. On which front?
A. On 23rd street.
Q. The front there is two hundred and thirty-one feet?
A. Yes, sir.
Q. Please say so that the jury can understand you definitely what that would be.
A. That would be about $58,000—that is, for the ground, I speak of.
Q. Running in depth to the river?
A. Running in depth to the river; yes, sir.
Q. Now, as to the buildings.
A. I never was inside of the buildings. I only can value and I only do value the building as a building without reference to
163 anything that it may contain. I value that building at about $20,000.
Q. You speak now without regard to any machinery?
A. Without regard to any machiney. I speak in regard to the building only.
Q. That was about 1879?
A. Yes, sir.
Q. Since that time there has been erected alongside of that lot on Filbert street an iron structure known as the Filbert Street Extension?
A. Yes, sir.
Q. What, in your judgment, considering the circumstance, was the market value of this property in 1881; the fall of and the spring of 1882—say two years ago?
A. I think about the same as I have mentioned. I don't think the property has changed in value this last six or seven years.
Q. Has the presence of that railroad affected its value in any way?
A. I don't think it has.
Q. As it now is?
A. No, sir.
Q. Has there or has there not been a depression in value since 1872, and to what period?
A. There was a very great depression in the values of real
164 estate immediately after the fall of 1873, and it continued for a couple of years before it began to regain its tone. In a great many places it has still continued. Some few places, perhaps, real estate values have improved.
Q. How has that depression affected manufacturing properties, if at all?
A. Manufacturing properties were also affected by it. Business became bad, and there were many factories to let. Lots sold very slowly for manufacturing purposes. I had a large amount myself and I could not sell it.
Q. What was the immediate cause of that depression, if you know?

Objected to as irrelevant.

Q. Will you give me, if you please, a reason for your estimated value of the property at fifteen dollars a foot or any reasons you may have for that—any illustrations?

A. That property at 23rd and Filbert is a property that is only suitable for manufacturing purposes; for nothing else. It is not suitable for dwelling-houses in any sense. The dwelling-houses that are already erected there are of a very poor class and bring very low rents. I own two of them myself between 22nd and 23rd, on the north side. Before the railroad was built I could not sell them for more than two thousand dollars or get more than ten and
165 twelve dollars a month rent. Properties that are suitable only for manufacturing purposes can be located in such neighborhoods and in such places as this is. The vicinity of the gas works would be very objectionable for dwelling-houses and yet be suitable for a manufactory. Now, property for manufacturing purposes does not bring, as a general thing, as high a price—that is, a lot will not cut up for as much money as a large lot will for manufacturing, for they can't afford to pay it and it won't bring it. Properties in that neighborhood and near it are for sale to-day, a great deal—properties that I know of of exactly the same size as this—at a great deal less price, better located in every sense, and not far from this property. I can name it if you wish me. There is a property to-day offered to me at the corner of 25th and South, 270 feet on 25th street and 450 feet on South street, extending back to Bainbridge. That property, with a street run through it, would have four fronts. It is offered to-day at twenty dollars a foot, and an offer is invited. I have no doubt that if I would make an offer for it at between $15 and $18 a foot it would be sold. $20 is the asking price for it.

Q. How does that property stand relatively to this?

166 A. That property, sir, is much superior. I would say that that property is worth to-day—I would give one-third more for it than I would for the Girard Tube Works lot. I don't know whether I wouldn't give more, on calm investigation.

Q. Why?

A. Because it is better located; it is in a section of the city that can be improved by dwellings. All of that lot could be improved by eight and nine roomed houses and six-roomed houses and be made to pay largely, and it is also suitable if a man wanted to build a large manufactory there he could do so; but it has a greater element of value in being able to be cut up for dwelling-houses, which the lot — 23d and Filbert streets has not. I consider that lot a much superior lot in every way—much more valuable and much better located than the one — 23rd and Filbert. Property below the Chestnut-street bridge I consider much more valuable than that above Chestnut-street bridge, because the property below the Chestnut-street bridge fronting upon the river is open to navigable water. Vessels can unload there. There is no draw in the Chestnut-street bridge. Therefore no ships can come north of Chestnut street.

167 —. You mean no masted ships?

A. No masted ships. Nothing but canal boats and lighters

and little tugs can come north of Chestnut-street bridge. Therefore the property north of the Chestnut-street bridge, as far as wharf property is concerned, is of very little value, in my opinion, but property south of the bridge is of very great value. Property south of Chestnut-street bridge about the same depth of this property at 23rd and Filbert street, 450 feet, is only worth to-day from $20 to $25 per foot. It is valued for taxation at only about $15 a foot; some of it perhaps $18, where it is at the corner. That property there running from Chestnut street down to Spruce street or Walnut and fronting on the Schuylkill river, is very valuable for all kinds of shipping business. To-day the wharves are filled with fine marble & merchandise, and Mr. Baird has his Italian marble and oil warehouse, and so on below Chestnut-street bridge. None of those can exist above the bridge, because, as I said before, it is not navigable.

Cross-examination by Mr. BIDDLE:

Q. I understand you to say that, in your opinion, this prop-
168 perty is worth just the same since the erection of the elevated road as it was before?

A. Yes, sir.

By the COURT:

Q. In speaking of this property as being worth $18 a foot you are speaking of it now?

A. In ground rents.

SAMUEL P. HITCHINSON, have been duly sworn, was examined as follows:

By Mr. FOX:

Q. What is your business?

A. I am a conveyancer.

Q. Have you anything to do with real estate transactions?

A. Yes, sir; I have had considerable to do with real estate transactions.

Q. How long?

A. About twenty-five or twenty-six years.

Q. In what location?

A. I have been twenty years at 126 South Sixth street.

Q. I speak with regard to where your operations have been?

A. In Philadelphia principally.

Q. What parts of Philadelphia?

A. All over the city.

Q. You have been called upon to give estimates as to value from time to time?

169 A. I have by my clients principally. When they want to buy they come and ask my opinion as to the property. I never testified much in court or anything of that kind.

By Mr. BIDDLE:

Q. You have been applied to by your clients to give your opinion as to values?

A. Yes, sir; as to value in loaning money and buying property.

By Mr. FOX:

Q. Have you seen the Girard Tube Works?

A. Yes, sir.

Q. You know the property?

A. I have looked at the property; yes, sir.

Q. How long have you known it?

A. I have known it off and on for several years, but not particularly.

Q. Can you give us what, in your judgment, was the value of that property in 1879—232 feet on 23rd street, extending in depth to the River Schuylkill, with the buildings on it?

A. I should suppose that property was worth about from $250 to $300 a foot.

Q. What would it be at $300—231 feet front, say? What, in your judgment, was the value of the property in 1882?

A. I shouldn't think it had increased much in value, if anything.

Q. Has it decreased in value?

170 A. I should think it would be about the same value now as it was then.

Q. About the same as it was three or four years ago?

A. Yes, sir.

Cross-examination by Mr. BIDDLE:

Q. Of course you take in consideration the erection of this structure?

A. Yes, sir.

Q. You were not asked what you put the buildings at. You were simply asked what you put the vacant ground at. What do you say about the buildings?

A. The buildings, I should think, were of very little value to-day. It would require a great deal, I should think, to fix them up. They look very much dilapidated.

Q. Have you been in the lot?

A. I have not been in the buildings at all. I am merely speaking of the outside.

Q. The buildings are of considerable extent, are they not?

A. Yes, sir.

Q. And you have not been in them?

A. No, sir.

BATEMAN POTTER, having been duly sworn, was examined as follows:

By Mr. FOX:

Q. What is your business?

A. Real estate.

171 Q. How long have you been engaged in real estate?
A. About sixteen years.
Q. In what section of the city of Philadelphia?
A. On Walnut street is my office.
Q. I mean where are your operations in real estate?
A. All over Philadelphia.
Q. You have been buying and selling largely for clients?
A. I have been buying some for customers.
Q. Do you know the Girard Tube Works property at 23rd and Filbert?
A. Yes, sir.
Q. How long have you known it?
A. For several years, sir.
Q. How many—say five, ten, or fifteen?
A. Well, I think eight or ten.
Q. What, in your judgment, was the market value of that property—232 feet front—in the year 1879, with the buildings on it?
A. I should think it would be worth about $75,000 to $80,000.
Q. Do you distinguish the buildings from the land?
A. Take the whole thing.
Q. Then you don't distinguish the buildings from the land as an item?
A. No, sir.
172 Q. Since that time there has been an elevated railroad built alongside of this property by the Pennsylvania railroad?
A. Yes, sir.
Q. In view of that circumstance what is the market value since; I mean in the year 1882?
A. That railroad was built in 1882.
Q. What is the value of the property since that railroad was built?
A. I don't think it has been depreciated any, sir.

Cross-examination by Mr. BIDDLE:

Q. You say you have bought property for your clients, but when Mr. Fox asked you whether you bought and sold you seemed to make a distinction. Have you sold much real estate in this city?
A. Yes, sir; I have.
Q. I asked you if you sold much?
A. Yes; I have sold considerable, sir.
Q. How do you get at the valuation of this property which you fix at $75,000 to $80,000?
A. I think $300 is a very fair price for it; very.
Q. Of course you take the 23rd-street front?
A. Yes, sir; that is the most available front of the two.
Q. Have you been inside of those buildings?
A. No, sir.
173 —. What did you estimate them at—anything at all?
A. No, sir. I put a valuation of about forty per cent. on the present assessment. The property is assessed now at $55,000.

Q. Then I understand you did not take the buildings at all into account?

A. No, sir. I took the present assessment.

JOHN CRUMP, having been duly sworn, was examined as follows:

By Mr. FOX:

Q. What is your business?

A. An architect and builder, sir.

Q. Where do you reside?

A. I reside at the Colonnade Hotel.

Q. Where have you practised your profession of architect and builder?

A. Chiefly in the city of Philadelphia. I always resided in Philadelphia.

Q. Have you been engaged more or less in the erection of manufacturing establishments at times?

A. At times—yes, sir—for thirty-odd years.

Q. And in that time have you also, as one of the incidents of your business, purchased and sold real estate?

A. To a small extent in that respect.

Q. As an architect and builder is it a fact or not that build-
174 ings that are erected for manufacturing purposes have an uncertain future life with regard to the purposes for which they are built?

(Objected to.)

Q. Have you seen the buildings at 23rd and Filbert known as the Girard Tube Works?

A. I have, sir.

Q. Have you been in them?

A. I have not. I passed them twice a day nearly all last summer, and have been there lately.

Q. You could see, of course, by your inspection what the buildings were generally?

A. Yes, sir.

Q. What was their condition?

A. I couldn't tell what the interior condition is, of course, not going inside; but I know they have been built for quite a number of years—probably fifteen years, it seems to me in my recollection. The inside wood-work must necessarily have lost its life; consequently it would be in bad condition. The external walls and such as that seem to be in fair condition.

Q. For what purposes are those buildings suitable?

A. For any manufacturing purposes connected with iron and such large and heavy work.

Q. Can you speak about the value of property?

(Objected to.)

175 Q. Have you purchased and sold property in the 8th and 9th ward?

(Objected to.)

Cross-examination by Mr. BIDDLE:

Q. I was a little surprised to learn that inside wood-work lost its life in fifteen years. My experience is very limited, but I thought I knew houses in Philadelphia that had very good wood-work in after half a century.

A. Are they located upon the river?

Q. No.

A. Were they built of hemlock joists?

Q. That I do not know. You said you were not inside, and therefore I do not know any more than you do. I understood you to say you had not examined the interior.

A. That is true, sir.

By Mr. MACVEAGH:

Q. You judge from the general character of the building?

A. From the general character of the building.

Q. And its location?

A. Yes, sir; I have been making an inquiry for two years along the Schuylkill front for a property, and have had properties of various kinds offered me, and I know pretty well where the prices
176 range. I have been a resident in that neighborhood—that is, 15th and Chestnut—for about twenty years and bought property of various kinds.

Q. And for how long do you say you have been looking for a property in that neighborhood?

A. Some two or three years, and I am looking now; making inquiries.

Mr. BIDDLE: I object to that, of course.

The COURT: If you wish to examine Mr. Crump as an expert you will have to start again.

By Mr. MACVEAGH:

Q. Have you or not familiarized yourself with the value of property in the neighborhood of this lot?

A. I have, sir.

Q. For how long a time past have you been so familiarizing yourself?

A. Took my first start in regard to it some fourteen years ago—1870.

Q. And you have more or less since then been familiarizing yourself with the values of property in that neighborhood?

A. That was my first beginning. Then there was a stoppage of a number of years and the last two or three years. I have had occasion and am looking now for a property, for which that is too large, for my business purposes of that character on the
177 Schuylkill river.

Q. What are your business purposes?

A. Stone; I have very extensive slate quarries and things of that kind.

Q. Your business is that of a builder and so forth?
A. Yes, sir.

By Mr. BIDDLE:

Q. I do not quite understand Mr. MacVeagh's phrase "familiarize." What have you done in the way of buying and selling in that neighborhood for the last two or three years?
A. I have neither bought nor have I sold.
Q. I understood you to say you began to look at property there about twelve years ago?
A. Yes, sir.
Q. Then there was a stop?
A. Yes, sir.
Q. Was that not for your own purposes alone?
A. Yes, sir.
Q. For individual purposes?
A. Yes, sir.

Mr. BIDDLE: I object to this witness as an expert.

By the COURT:

Q. In what way did you familiarize yourself with the value of property?
178 A. In the first place I was very near purchasing the lot on the south side of Chestnut street, now occupied by the Consumers' Ice Company, on the south side of Chestnut- street bridge. I was asked $18,000 for that lot. That was my principal basis of general values as connected with the properties along the Schuylkill wharves. This property I have looked at and I considered it not so valuable as the other.

ROBERT PATTERSON, having been duly sworn, was examined as follows:

By Mr. FOX:

Q. What is your occupation and where do you reside?
A. I reside at this present time at Morton, on the West Chester railroad, nine miles out of town.
Q. Where was your home previous to that?
A. My home was, fifty years ago, at 19th and Market, and from 19th & Market to 22nd and 23rd and Cuthbert, and from 22nd and 23rd and Cuthbert to 23rd and Race.
Q. How long were you at Cuthbert street between 22nd and 23rd?
A. I think I was there about two years; and from there to 23rd and Race.
Q. How long were you at 23rd and Race?
A. I moved away from 23rd and Race December, 1870.
179 Q. When did you go there?
A. 23rd and Race; I went there in 1850.
Q. Then you were there twenty years?
A. Yes, sir; then I went up to the corner of Race and Claymont.

By Mr. BIDDLE:

Q. Where is Claymont?

A. Claymont street is opposite Macklin from 20th to 21st, running from 21st to Cherry. I built a house there and moved there December, 1870. I remained there until April, 1876; then I moved into the country. Since that time I have been sleeping in the country and eating and living in Philadelphia.

By Mr. FOX:

Q. Where is your business and what is it?

A. My business is shipping and transportation, and my office is 108 Walnut street.

Q. Are you engaged at all in the business of storage or anything of that sort?

A. My business is general transportation; I am in the retail sand business and also teaming business; I have a number of teams running through the city.

Q. You have been, then, in the neighborhood of the Girard Tube Works—within a comparative distance of that building—how long?

180 A. I lived between 19th and 20th and Market street; I lived there and never was away from there; that is the furthest I have ever been away from the Girard Tube Works for fifty years. Even in the country I am not away from it, because my sand wharf is there as well as my office, 108 Walnut street, and consequently I am there all the time—backward and forward all the time.

By Mr. BIDDLE:

Q. Backward and forward there?

A. I might say before the elevated railroad started——

Q. You mean pass it?

A. Yes, sir.

Q. 108 Walnut is near the Delaware?

A. Yes, sir. I also have an office and a sand wharf on Race-street wharf, Schuylkill. Before the elevated railroad was built, of course, we got out at 30th street, and consequently I walked from there over to my sand wharf, 23rd and Race.

By Mr. FOX:

Q. In the course of that fifty years have you had anything to do with the purchases and sales of real estate at all?

A. Well, I have had something to do with the purchases and sales.

Q. Have you had any familiarity at all with the values of
181 real estate in that section of the city, either by reason of your business of keeping a sand wharf or for any other causes?

A. Yes, sir; I first started to do business at Race-street wharf, which was known then as the lime-kiln. I started to do business there first—to carry limestone to these kilns—in 1844, I think it was.

After that I started to carry in 1847. I may say that from 1847 to the present time I have never been but doing business on Race-street wharf.

Q. You are perfectly familiar with the whole neighborhood?

A. I am entirely familiar with that neighborhood—yes, sir; I I have purchased and sold both real estate there. I both bought and sold right there.

By Mr. BIDDLE:

Q. Where?

A. At Race street.

By Mr. FOX:

Q. 23rd and Race?

A. 23rd and Race-street-.

Q. What are the conditions of the street wharves of the city on the Schuylkill river with regard to their private or public ownership?

(Objected to.)

Mr. FOX: I propose to show by this witness that the ends
182 of blind streets on the Schuylkill river, so to speak—streets that have no thoroughfare across the river—are used by the city for private purposes, rented to private individuals, and occupied entirely for private purposes.

By Mr. FOX:

Q. You have said that you occupied Race-street wharf?

A. At the present time.

Q. As a sand wharf?

A. Yes, sir.

Q. Speaking with regard to your familiarity with the property there, what do you——

Mr. BIDDLE: He said he was familiar with the localities. He has not said he was familiar with values.

The WITNESS: I say I am familiar with its value.

By Mr. FOX:

Q. What, in your judgment, was the value of the Girard Tube Works property in the year 1879?

(Objected to.)

Mr. BIDDLE: I want to cross-examine the witness with regard to values.

By Mr. BIDDLE:

Q. You say now that you are familiar with values at 23rd and Filbert street. What are your means of knowledge?

183 A. No, sir; I didn't say so. I said I am familiar with the value of property in that neighborhood.

Q. What neighborhood?

A. Running from below Arch street up, I might really say, to Wood street.

Q. Will you swear to this jury that you are familiar with values at 23rd and Filbert?

A. At this present moment?

Q. Yes.

A. Well, I will swear that I am familiar with the values of it some years gone by.

Q. When?

A. Probably 10, 12, 14; probably down as low as in the neighborhood of nine years.

Mr. BIDDLE: I object to this witness.

ALFRED GRATZ, having been duly sworn, was examined as follows:

By Mr. FOX:

Q. What is your position?

A. I am a real estate assessor.

Q. In what division?

A. In the 7th division. It composes the Ninth and Tenth wards, from 13th street to the Schuylkill, and from Chestnut street to Vine.

Q. That is the district in which the Girard Tube Works are situated, is it not?

184 A. Yes, sir.

Q. What is the assessment of the Girard Tube Works for taxes?

A. Well, it is in two assessments. The first is for 153 feet six inches, to the Schuylkill, on 23rd street; that is $40,000. The other is a lot 77 feet five inches, extending to the Schuylkill, and that is $15,000.

Q. That is the assessment for what year?

A. The present assessment.

Q. For the year 1884?

A. Yes, sir.

Q. What was the assessment of that property in 1878 and 1879?

A. I can't say. That was before I was in the district.

By Mr. BIDDLE:

(To the witness:) If you have them there you may give us from 1879 up. You may read them from a book.

A. I haven't the blotters here, sir.

By Mr. BIDDLE:

Q. It is every three years, is it not?

A. No, sir; we take the assessment every year.

Q. You do not consider sheriffs' sales a test, do you?

A. No, sir.

By Mr. Fox:

Q. What do you consider a test?

185 A. We call it anything but a sheriff's sale. A sale at Thomas & Sons' we consider a test.

Q. Is that with due advertisement and notice?

A. Yes, sir. A forced sale we don't take as a test.

Q. Anything but a forced sale?

A. Anything but a forced sale.

CORNELIUS HAGGERTY, having been duly sworn, was examined as follows:

By Mr. Fox:

Q. What is your position?

A. Assessor of real estate.

Q. In what district?

A. The seventh district—9th and 10th wards, west of 13th street to the Schuylkill.

Q. Does that comprise the district in which the Girard Tube Works are situated?

A. Yes, sir.

Q. Then you are the coadjutor of Mr. Gratz?

A. Yes, sir.

Q. You have heard what he said?

A. Yes, sir.

Q. You corroborate what he said for this year in regard to the assessment?

A. Yes, sir.

Q. What was the assessment, if you know it, in 1877, '8, and '9?

186 A. $50,000—that is, 1877—that is, the 153 feet. I think that is it.

By Mr. BIDDLE (to the witness): If you had any memoranda taken from the books you may look at them.

A. I have no memoranda.

Q. If you know the other lot you can speak of it.

A. $15,000.

By Mr. Fox:

Q. How long has the assessment been $15,000 on the other lot?

A. It has been that way for some time.

Q. What is the basis of value of assessments for taxes?

A. For fair sales with advertisements, public notices, at either Thomas' or Freeman's. We don't take sheriffs' sales.

Q. Well, you corroborate exactly what Mr. Gratz said about it.

A. Yes, sir.

(No cross-examination.)

WILLIAM WHARTON, Jr., having been duly affirmed, was examined as follows:

By Mr. FOX:

Q. What is your business?

A. Manufacturer and dealer in materials relating to rail-
187 way construction—street railways particularly.

Q. Have you had anything to do with steam railways?

A. Something; both kinds.

Q. Where is your place of business?

A. 25th and Washington avenue one place, another place out at Jenkintown, on the North Pennsylvania railroad, and another place at 23rd and Washington avenue.

Q. The place at Jenkintown is the Wharton Switch Company's establishment?

A. Yes, sir.

Q. Are you by profession an engineer?

A. No, sir; I never studied engineering, but I have learned a great deal of it in my business.

Q. Have you in the course of your business had occasion to connect manufacturing establishments with railways?

A. Yes, sir.

Q. And you observed in that connection where manufacturing establishments are most apt to go?

Mr. BIDDLE: What do you intend to prove by this witness?

Mr. MACVEAGH: We intend to prove that manufactories of iron now seek localities immediately alongside of railroads; that tube
188 works, iron works, furnaces, forges, foundries, and all such iron establishments now preferably seek nearness to railroads instead of seeking distance from them.

Mr. BIDDLE: I will not make any objection.

By Mr. MACVEAGH:

Q. I wish you would state from your knowledge of the subject, and give such instances as you can, whether tube works, foundries, and iron manufactories generally, and machine shops, now are located preferably alongside of, near to, or away from railroads.

A. All such establishments are located as near railroads as they can get them to have convenient connection, and an establishment that has not any such connection is at a great disadvantage. As to the instances, I can more particularly call the case of our own establishments, where we located alongside of railroads where at that time there was no connection; but we so located and so preferred the locality because we believed we would be able to get a connection, which we were able to do finally. In some cases it took a little longer than we would have liked, but at the place at 25th and Wash-
189 ington avenue we had railroads on both sides of us and no connection at all into the works. I picked out personally that particular place for that very reason, hoping and believing that we could get a connection. The Pennsylvania Railroad

Company objected at first on account of the place being on an important curve. They said it was a very objectionable and a dangerous place to put in a switch.

Q. They declined it?

A. They declined it positively, but finally they put it in. They were very accommodating and did their full duty in the matter, and have found it a very great advantage. I don't know any establishment for the manufacturing or the handling of heavy goods, especially iron goods, which would have any show at all in the competition of modern times unless it had some railroad facility.

Q. Something has been said here about the location of woolen or other manufactories of any kind along railroads. I wish you would state whether your observation extends to the location of general manufacturing establishments now.

A. Yes, sir.

Q. How is it at Manayunk and the Falls of Schuylkill?

190 A. At all such places the universal desire is to get railroad facilities. At Wayne junction there are several large establishments that have been put up since the junction was established there. It has led people wishing facilities for manufacturing to go there.

Q. General manufacturing?

A. Yes, sir; there are several large mills there not in any way connected with iron manufacturing, and a woolen or cotton or carpet works—very large—and they have been putting up some additions recently.

Q. Dobsons' woolen works?

A. I don't know whose works they are.

Q. Do you know the works at the Falls of Schuylkill?

A. Yes, sir; I am familiar with that. There is no reason why this particular lot should not have the advantage of a connection, that I can see. If there is no cross-track the railroad company don't want to break its through line; but wherever there is a large establishment put up I always notice that the railroad company want to get that trade. It is to their interest. They often will pay part of the expense—sometimes the whole expense. It depends altogether on the nature and the amount of the business. There is

191 room on that lot to put up buildings. The present buildings are not good; they are old. I have known them at least fifteen and, I think, for twenty years. They were used for tube works, and, as to noise, a tube works is a very noisy establishment necessarily. I can't conceive anything more noisy than a tube works in operation when they are welding up the tubes.

Q. They of course need powerful steam-engines and need a great deal of vibration in the operation of their works?

A. It is a very heavy, resounding, loud noise necessarily, and they must have very heavy machinery to do their work generally.

Cross-examination by Mr. BIDDLE:

Q. One of your establishments is still at 23rd and Washington avenue, is it not?

A. Yes, sir.
Q. You are carrying on business actively there, are you not?
A. Not actively, excepting in the foundry.
Q. How many passenger trains pass there in a day?
A. At present very few.
Q. Is not the business of the passenger traffic carried away from there now?
192 A. To a great measure, for the reason that the Broad-street station has been established and the railroad takes the trains in there.
Q. You mean at Broad and Market?
A. It is Broad and Merrick.
Q. I mean to contradistinguish it from Broad and Washington.
A. Yes, sir.
Q. You mean the new station at Broad and Market?
A. Yes, sir; they bring all the trains in there and they don't bring in any at Broad and Washington—only a few.
Q. You have said a great deal about the value of a connection. You consider that a matter of importance, do you not?
A. Almost vital importance for a manufacturing establishment.

C. W. BUCHHOLZ, having been duly affirmed, was examined as follows:

By Mr. MACVEAGH:

Q. You are engineer of the road about being constructed on the east bank of the Schuylkill in this city?
A. I am; yes, sir.
Q. Has it been located through the Girard Tube Works?
A. It has.
Q. Have you the plan of such location with you?
193 A. I have.
Q. What is the name of the company?
A. The Schuylkill River East Side Railroad Company.
Q. Where does it connect on the south?
A. With the Chester Branch of the Philadelphia & Reading railroad near Gray's Ferry bridge.
Q. And at the north?
A. It connects with the city branch of the Philadelphia & Reading railroad near 21st and Pennsylvania avenue.
Q. And thereby makes a complete connection with the entire system of the Philadelphia & Reading railroad and its leased lines?
A. Yes, sir.

Mr. BIBBLE: What is the object of this?
Mr. MACVEAGH: The object is to show that a railroad is being constructed through this property substantially at grade, affording all the railroad facilities that it could possibly have, and to show that our view of the uses of this property is practically justified.
We offer to prove that the Schuylkill River East Side Railroad Company, a corporation duly incorporated under the laws of this

State to construct a railway from a point near Gray's Ferry,
194 where it connects with the Chester Branch of the Philadelphia & Reading Railroad Company, to a point near Fairmount, where it connects with the general system of the Philadelphia and Reading railroad and its leased lines, has located its line along the east bank of the Schuylkill and through this property at grade at an average distance of about 30 feet from the river front, the established port-warden line.

(Objected to.)

The COURT: The inquiry before us is whether the market value of the property in question was lessened by reason of the construction of the Pennsylvania railroad alongside of it, and, if so, how much—that is, what was the difference between its value before the road was built and immediately afterwards. As *as* throwing light upon that you propose to show that another railroad company is going to build through this property, possibly to its injury and possibly to its benefit. I do not see that that throws any light upon the question.

(Objection sustained.)

By Mr. MACVEAGH:

Q. Have you charge of the negociations with the owners of this property or the representatives of the owners of it?
195 A. I did have one meeting with them; yes, sir.
Q. Has anybody else, on behalf of the company you represent as engineer, had such negociations, to your knowledge?
A. Yes, sir; I think the real estate agent of the company had.
Q. Who?
A. Mr. Loomis.
Q. With whom were the negociations you had?
A. With the attorney, Mr. Todd.
Q. I wish you would state what they were.

Mr. BIDDLE: Will your question go to the effect of offers on either side?

Mr. MACVEAGH: It will go to the effect of offers, I suppose. I want to know what they were.

By Mr. MACVEAGH:

Q. Did you make any offer for the property?
A. I did not.
Q. Do you know whether any was made?
A. No, sir; I don't think there was.
Q. What was the character of the negociation?
A. The question was how much damage they would ask for going through their property. The proposition was supposed to come from them.
196 Q. What was the answer to that?
A. No answer at all; they were kicked out of the office, as it were.

Q. Was there any reason stated?
A. Yes, sir; on account of the litigation; that they could not consider any question about the property as long as this litigation was going on.

Cross-examination by Mr. BIDDLE:

Q. You said your negociations were with this gentlemen (indicating Mr. Todd)?
A. Yes, sir.
Q. Didn't he say if you filed a bond he would commence a suit against the company?
A. Yes, sir; file a bill; that is what he said.

By Mr. MACVEAGH:

Q. I would like to know what width of right of way is taken through here?
A. Sixty feet; thirty feet through the center.

Mr. MACVEAGH: I want to prove also in this connection that from the location made of this road, of which the witness is the engineer, there would be no difficulty whatever in putting in a
197 switch to the works of the plaintiff from that road.
Mr. BIDDLE: That is the new road?
Mr. MACVEAGH: Yes.
(Objected to; objection sustained.)

JAMES W. SAYRE sworn:

Mr. FOX: I propose to show by Mr. Sayre, who is the chief clerk of the board of revision of taxes, that the assessment of taxes have been made there in that section, and, so far as this property is particularly concerned, without regard to the question of the construction of the elevated railroad, that it has not been an element in the question of value.

Objected to; objection sustained.

Mr. FOX: Then I propose to show what the assessments of these properties were from 1877 to the present day.
Mr. BIDDLE: That I do not object to. Mr. Sayre may read it from his book.

By Mr. FOX:

Q. If you have a memorandum of it just read it.
A. I have a certificate here of the assessed values of two pieces of property, one at the northwest corner of 23rd and Filbert, described as a three-story brick factory, and lot 153 feet on 23rd street by 426 feet on Filbert street to the Schuykill river for the
198 year-1877, 1878, 1879, 1880, 1881, and 1882, taken from the assessor's books for this year. For 1877 and 1878 that piece was assessed at $50,000 each year; 1879, 1880, 1881, and 1882, $40,000 each year. I have also an assessment taken from the same books,

a lot on the west side of 23rd street, north of Market, 389 feet six inches north line, 400 feet south line, 77 feet five inches on the east line, and 78 on the west line. That was assessed at $15,000 each year.

Q. I noticed on your reading that there was a fall in the assessments about the year 1879. What was that?

A. That was a general reduction made by the board throughout the city. We reduced the tax duplicate fifty-two million that year.

Q. Of course, that had nothing to do with the building of this railroad?

A. No, sir.

Cross-examination by Mr. BIDDLE:

Q. There was a general reduction of about fifty-two millions in the whole volume?

A. In the whole city; yes, sir.

JAMES BARTLEY called on behalf of defendants.

199 By Mr. MACVEAGH:

Q. You are the yardmaster of the Filbert Street Extension?

A. Yes, sir.

Q. Extending from the Broad-street station to the West Philadelphia yard?

A. Yes, sir.

Q. You are familiar with this portion of the Filbert Street Extension, opposite the Girard Tube Works?

A. Yes, sir.

Q. About what distance from the surface of the street is the bottom of the structure there? How much clear distance is there under the structure?

A. I should judge there was about between thirty to forty feet.

Q. The entire width of the street?

A. Yes, sir.

By Mr. BIDDLE:

Q. You mean the elevation of the lower part of the structure is about thirty to forty feet above the cart-way.

A. Yes, sir.

By Mr. MACVEAGH:

Q. And the cart-way is unobstructed between the curbs?

A. It is unobstructed.

Q. The pavement has an obstruction to what extent from
200 the curb-line in—about two and a half feet square where each pillar rests?

A. That is it; yes, sir.

Q. And how far apart are the pillars?

A. I should judge they are about fifty to sixty.

Q. At the crossing of 23rd street there is a sheet-iron screen?
A. Yes, sir.
Q. About how high from the sills?
A. About 13 or 14 or 15 feet.
Q. Of what extent is the roadway upon the road-bed from the station to the river and to what extent is it upon the pillars?
A. I don't quite understand that.
Q. From the Broad-street station west how far does the structure rest upon a solid roadway?
A. As far west as what they call Shock street; that is just this side of 23rd street.
Q. From there to the river it rests upon iron pillars?
A. Iron pillars.
Q. What portion of the roadway resting upon the iron pillars is covered and what portion open?
A. It is all covered between tracks, and between the rails of each track there is an open space, I should judge, about two and a half to three feet.
201 Q. It is all covered between the tracks?
A. Yes, sir; and over all streets—that is, all cross-streets that cross under.
Q. But between the rails?
A. There is an open space; there is a plankway runs between the rails of each track.
Q. In the middle of the rails of each track?
A. Yes, sir.
Q. All the distance?
A. All the way over the bridge to 30th street.
Q. How are the passenger cars coupled that come in and out of that station; are they coupled by coupling-pins, or how?
A. They are coupled by patent Janney couplers. We use no link and bolt or loose iron.
Q. You use no loose bolts or links on your passenger trains?
A. No, sir; none at all.
Q. There are some used on the freight trains?
A. On the freight trains they use link and bolt.
Q. How with reference to the expulsion of sparks in the operation of this road; what care is shown in the management of
202 engines to and from the Broad-street station?
A. All the engines from the different roads running in there are equipped with patent spark-arresters. That is a patent arrangement in front of the smoke-stack box to catch everything coming from the furnace.
Q. What is the character of the smoke-stack itself? Has it a spark-arrester?
A. A spark-arrester over it.
Q. A mesh over it?
A. Yes, sir; a sort of a net. When they are in perfect order it is impossible for a spark over the size of a common shot to get out through the netting or through the spark-arrester.
Q. How long has that Filbert Street Branch been in operation?

A. It has been running passengers since December, 1881.
Q. And freight since April, 1881?
A. April, 1881; yes, sir.
Q. Have you been there all the time?
A. Yes, sir.
Q. How many fires have been reported to you as having occurred in that time?
A. All ever I heard of is two.
Q. Where were they?

203 A. There was one on Jones street west of 18th; I don't recollect the number of the house, and another one on a court running north of Filbert street, just this side of 21st.

Q. When were they?
A. Last spring. They didn't amount to much. I didn't hear of them for a day afterwards; burned, I suppose, about a dozen shingles of the roof of each house.

By Mr. BIDDLE:

Q. I think you said the freight trains began in April, 1881?
A. Yes, sir.
Q. And the passenger trains in December, 1881?
A. December 5th, 1881.

By Mr. MACVEAGH:

Q. The freight business done over that section is comparatively small?
A. Yes, sir.
Q. The great bulk of it is done in West Philadelphia?
A. Yes, sir.
Q. All the live stock and the freight and the coal, mainly?
A. Yes, sir.
Q. And freight to and fro, north and south, is all shifted there?
A. Yes, sir.

204 Q. So that it is the lighter freight running into the city or going out from it, and the Adams Express Company?
A. Certainly.

Q. How about the escape of water and other dirt on the Filbert Street Extension, either on the engines or the cars—what precautions are taken in that respect?
A. From water—all engine- have been instructed not—fill their tanks full of water so as to run over the end of the tank. Most of the engines take water at the West Philadelphia round-house before they come in. They have a grade to come up, which throws the forwards end of the tank down before they come on the extension, and if there is any runs out it runs out there.
Q. How about the different water-closets of the different passenger cars?
A. They are all locked, both directions.
Q. Before they come into the city and before going out?
A. Yes, sir.
Q. Until after the- pass Powelton-avenue station?

A. Until after they pass Powelton-avenue station. I have examined that for the last three or four months. I haven't found but one that was open.

205 Cross-examination by Mr. BIDDLE:

Q. Have you been the roadmaster since the opening, have you not?

A. Yes, sir.

Q. That would be the spring of 1881 for freight and the early winter of the same year for passenger trains?

A. Yes, sir.

Q. You have told us that the freight business was comparatively light. That is to prevent its interfering with the passenger traffic, isn't it?

A. No, sir; the freight is independent of the passenger.

Q. Your passenger traffic there is very large?

A. Yes, sir; very large.

Q. You have trains going out to New York, you have trains going to Pittsburgh and all the intermediate places, and you have trains going to Baltimore and Washington south, and also on the West Chester road?

A. Yes, sir.

Q. So that you have four distinct roads carrying passengers, all starting from Merrick and Broad?

A. Yes, sir.

Q. I think you told us before that there were about 450 trains, full and empty, moving east and west a day, and, if my recol-
206 lection is right (and if it is not I beg you to correct me), that about 250, perhaps 300, were passenger trains. How is that?

A. About 250 passenger trains.

Q. So that rather the larger half are passenger trains?

A. Yes, sir.

Q. I infer, from what you have answered to Mr. MacVeagh, that you mean to say that every proper precaution known to railroad men is taking in the running of these trains?

A. Yes, sir.

Q. You endeavor to run them so as to cause as little annoyance as possible?

A. Yes, sir.

Q. You told us of two fires having occurred. That was on the eastern section?

A. Two that I heard of.

Q. Was it a freight or passenger train that ran into the third story of that house and carried it away? There was such an accident, was there?

(Objected to.)

Mr. BIDDLE: I offer to show by Mr. Bartley on cross-examination that within two years one of the trains, either freight or passenger, on this Filbert Street Extension shot into the third story or upper part of one of the houses and carried it away.

Objected to; objection sustained; exception by plaintiff.

207 Mr. BIDDLE:

Q. There is a station called the 21st-street station on this road, is there not or was there not?

A. Yes, sir.

Q. Is the use of that as frequent as it was?

Mr. MACVEAGH: What is it you want to show in the way of cross-examination?

Mr. BIDDLE: I want so show that by reason of the constant running of trains the 21st-street station, which, I suppose, historically we all know has been very considerably diminished in its use, and I want to bring that to bear upon this misty, vague question which has been put out, but not with anything like precision, about getting a railway connection. I want to show the improbability, if not impossibility, of having any such connection as that which has been rather suggested, and, I suppose, will be continued to be suggested than put forward as a fact.

The COURT: This is not a question of convenience of location of the station which has been spoken of, but actual connection by switch.

Mr. BIDDLE: I want to show that they have been compelled to disuse the station where people in alighting from the trains
208 crossed over at grade, because of the frequency of the running of passenger trains. I want to show immediately afterwards, the house being located on the north side, two squares from our property, it would be a practical impossibility to make connection by reason of these two hundred and fifty trains running at almost every minute in the day, the evidence being that they run on an average at an interval of three minutes and twelve seconds during the day and night—twenty-four hours. I want to show, as part of the management, they have been compelled to abandon practically this station and to refute this notion of any connection.

Mr. MACVEAGH: We object to that.

The COURT: I think the objection is well founded. You can show that as an independent fact, but it is not cross-examination.

Objection sustained. Exception by plaintiff.

Mr. BIDDLE:

Q. You have told us that the freight trains do make use of coupling bolts and chains in the old-fashioned way, and you have also told us that the inster-tices or openings (spaces) between the
209 tracks where the road passes on pillars from somewhere on 21st street to 30th street to the river —. Do you not -now, from record or actual inspection, that large bodies of iron—describe the size yourself—and other materials do constantly fall there?

A. I never heard of any.

Q. Have you never heard of large spikes and bolts being found in the street beneath?

A. I never heard of any; no, sir.

Q. Have any reports been made to you by Mr. Ramsey about torpedoes and breaking of the windows in the factory?

A. Not by Mr. Ramsey.

Q. By anybody?

A. In the early part of 1882 we had complaint about the men on the freight trains throwing stones or torpedoes into the windows.

Q. Did you act upon that complaint?

A. Yes, sir; the men on the freight trains, they all denied it. We had several officers there watching it for two or three weeks.

Q. Try to recollect. I do not ask you whether you have ever known of things falling. I ask you if you have never heard of large bodies falling on the street, on this Filbert Street Division of the Pennsylvania railroad, between 30th and 20th streets, at any time at all, through the openings between the tracks?

210 A. I never have.

Q. You are reported by the stenographer as having said upon a former trial of this case on cross-examination, when you were called by the defendants' counsel, page 96, about the middle of the page, as follows:

"Q. Were you here yesterday when Mr. Craft, Sr., was examined?

A. No, sir.

Q. A witness has testified that a portion of an air-brake fell through within two feet of his elbow. 'Don't you know that these big pins, which I call coupling pins,' have fallen through occasionally?

A. I have heard of it. I have never known it to be a fact.

Q. You have heard it from your employés?

A. I have heard them speaking of it.

Q. What else have you heard them speaking of?

A. That is, I mean to say that I heard them speaking as if they heard of parties down around that neighborhood who picked them up, but they didn't see them fall—didn't know what they fell from.

Q. What else have you heard of falling besides these bolts—pieces of chain, links?

A. No, sir; I have heard of a poker falling here, but we couldn't find it after we went to hunt it."

Q. Is that a proper record of your examination?

211 A. The poker; I heard of that; I recollect that.

Q. I ask you about the air-brake.

A. The air-brake; I never heard of it.

Q. Then you mean to say this report does not give your former examination?

A. I don't understand that.

Q. These notes that I have just read—your questions to you on your former examination and your supposed answers to them—are taken by a regular stenographic reporter. I ask you whether what I have read from these notes is, in your judgment, a fair statement of what you said formerly or an incorrect statement?

A. It is a fair statement. What I mean by hearing of these

things falling there, they have never been reported to me. That is the way I took your last question.

Q. You are reported here as having said in answer to this question, which I will read again, because you may very well have forgotten it, and I want you to be correct:

"Q. A witness testified that a portion of an air-brake fell through within two feet of his elbow. Don't you know that these big pins, which I call coupling pins, have fallen through occasionally?

A. I have heard of it. I have never known it to be a fact.

Q. You have heard of it from your employés?

212 A. I have heard them speaking of it."

Q. Is that right?

A. Yes, sir; that is correct.

Q. I ask you to-day if you have not heard the same thing?

A. I understood your question to-day, had they ever been reported to me.

Q. I do not mean to put it that way, or I did not the second time. I ask you now whether you have not heard from your employés of bolts and pins—large iron substances—call them by what names you may—falling through the openings of the track into the street?

A. I have heard them speaking of it; yes, sir.

Q. In what way have you heard them speaking of it—finding them on the street?

A. No, sir.

Q. How then?

A. I don't recollect right what way I heard them speaking of it. There are several of them live in the neighborhood.

Q. On what street?

A. Not on that street. Some live on 21st street between Market and Chestnut. Those are the men I heard speak of it.

Q. Then you have heard of such things falling?

A. I have heard them speak of it; yes, sir.

Q. From your employés?

213 A. Yes, sir.

Q. I understand you to say that the smoke-stacks of the engines are now provided or perhaps have been all the time provided with nets or screens—meshes—to keep the sparks in; that large sparks could not come out. Do you say that?

A. Yes, sir; when they are in proper order.

Q. But you have heard of two houses on the line of this Filbert-Street Extension having taken fire?

A. Yes, sir.

Q. Then the sparks were large enough to fire the roofs of those houses, were they not?

A. They may have been.

Q. They did?

A. Well, it is supposed to be set on fire by the locomotive. We never found it out to be an actual fact.

Q. Were they reported to you?

A. Yes, sir.

Q. Who by?

A. By our own men that witnessed it—witnessed the fire—did not witness the taking fire. Some of our own men seen it a few minutes after it had taken fire.

Q. As the engines pass, on an average, between three and
214 four minutes, I suppose they reported them as being probably set on fire by sparks, didn't they?

A. Yes, sir.

Q. Have any reports been made to you as roadmaster of any other accident occur-ing on that line of road except these fires and what you spoke of as to the breaking of the windows—I except them? Has anything else been reported to you as occur-ing by way of injury or depredation to any of the properties along there?

A. Nothing that I remember of.

Q. I wish you would try and think if you don't recollect something more important than the falling of a bolt.

A. No, sir; I don't recollect of hearing of any.

Mr. BIDDLE: I wish to refresh the witness's memory.

Mr. MACVEAGH: If it is as to a particular accident, I object.

Mr. BIDDLE: Yes; it is. If your honor thinks I ought not to go into it I will not name it.

The COURT: I do not think we have anything to do with a particular accident occur-ing here.

Mr. BIDDLE: I want to call it an incident, not an accident. Mr. MacVeagh calls it an accident; I differ from him.

215 Defendant's counsel offer in evidence the charter and supplements of the Pennsylvania Railroad Company, charter approved April 13, 1846, from book entitled "Acts of Assembly," which we have here—pamphlet page 312 of the Acts of Assembly of 1846. Prout the same.

Mr. MACVEAGH: Section 17 is the section to which I purpose specially to refer.

Defendants' counsel also offer act of Assembly from the Pamphlet Laws of 1857, page 519, entitled "An act for the sale of the main line," approved May 16th, 1857. Prout the same.

Defendants' counsel also offer in evidence deed-poll of the Commonwealth of Pennsylvania to the Pennsylvania Railroad Company for the main line, dated the 31st day of July, 1857. Prout the same.

Also a further supplement, Pamphlet Laws, 1848, page 273, approved March 27th, 1848, section 4. Prout the same.

Defendants close.

Testimony in Rebuttal on Behalf of Plaintiffs.

Plaintiff's counsel offer in evidence act of Assembly of April 4th, 1868, Purden's Digest, page 1094; limitation of liability act. Prout the same.

Mr. MacVeagh admits its acceptance by resolution of the
216 board of directors of the Pennsylvania railroad on the 15th day of April, 1868.

Offer objected to by defendants. Objection overruled. Exception for defendants.

Plaintiff's counsel also offer in evidence ordinance of counsels of the city of Philadelphia, 13th October, 1879, entitled "An ordinance to authorize the Pennsylvania railroad to occupy a portion of Filbert street for railroad purposes" (page 58 of the plaintiff's paper book). Prout the same.

Objected to; objection overruled; exception for defendant.

Mr. BIDDLE: We propose, understanding you to say that when we asked Mr. Bartley on cross-examination it was not proper cross-examination, to ask, individually, as a part of our case, the same question in regard to the 21st-street station.

We propose to ask Mr. Bartley, the yardmaster of the company on this part of the road, why they disused, as frequently as heretofore, or why they used in a diminished way, the 21st-street station.

The COURT: That is directed to show that it is impracticable to make any connection with the property by switches?

Mr. BIDDLE: Not mechanically, but with the operation with this road as it is.

Objected to because it does not tend in any degree to prove the matter.

217 Mr. BIDDLE: I offer to show for the purpose of demonstrating the practical impossibility of getting a railroad connection from the premises of the plaintiff to the road of the defendants in front of the plaintiff's property—

First, that at the stations used on the defendant's road, where a passenger train stops, all trains moving to or from said station are obliged to stop.

Next, that the station at 21st street has been either disused or largely diminished in its use as a passenger station by reason of the frequency of the passage of trains and the difficulty of causing stoppings at this place.

I offer all this as bearing upon the practical impossibility of giving a connection at any point between 23rd and Filbert and the rest of the plaintiff's property upon this road.

Objected to as irrelevant, because it does not legitimately tend to prove the object for which it is offered *as* has no proper or necessary connection with that offer. Objection sustained. Exception by plaintiff.

The COURT (to Mr. Biddle): I will allow you to show by any
218 proper testimony that it is impracticable to make any connections.

JAMES BARTLEY recalled and examined as follows:

By Mr. BIDDLE:

Q. You have told what the number of trains running up and down this Filbert Street Extension is. Would it be practicable, with

two hundred and fifty passenger trains moving in both directions, to make a connection from this property to the road of the Pennsylvania railroad on front of Filbert and 23rd street or along the line of that property?

Objected to on the ground that no basis has been shown for any capacity of this witness on the subject.

Mr. MacVeagh: He is simply a yardmaster. I presume he will say, I do not know, that he has nothing whatever to do, with reference to putting in or taking out switches.

The Court: We are not speaking of the mechanical construction. I infer that the yardmaster has as much knowledge upon that subject as any one connected with the railroad. (To Mr. Biddle.) Perhaps you should show that. You should show what his duties are in relation to that.

Mr. Biddle:

219 Q. You have told us several times that you are the yardmaster of that section from Powelton avenue to Merrick street. What are your duties in particular?

A. My duties are to see that all trains are made up—all trains are coupled properly; moved promptly on time; no irregularities in the movement of trains between Powelton avenue and Broad street.

Q. With this knowledge that you have given us, which I supposed, of course, was part of your duty, what effect would having a switch in front of this property have upon the regularities or irregularity on the movement of trains?

A. At certain times in the day it would have an effect; take from six in the morning until about noon.

Q. How about from noon until six in the evening?

A. Fro. about three or four o'clock in the afternoon up to eight it might have an effect.

Q. Are there any sidings between the Merrick-street station and Girard avenue now—east of Girard avenue from the passenger track?

A. Nothing leading from the passenger tracks, except one siding that is at the gas-house at 23rd street.

220 Q. Does not the north passenger track come as close to this property that we have been talking about as possible; isn't it at the very extreme end of the elevated railroad?

A. Yes, sir; the north track is.

Q. That is used all the time by passenger trains, is it not?

A. Yes, sir.

Q. Would not a siding have either to touch or cross that track to be made available for this property?

A. It would have to touch this track.

Q. There is no siding on the north side of this road between Girard avenue and Merrick street, to your knowledge, from the passenger tracks?

A. No, sir.

Q. Girard avenue is west of where the New York Branch turns off?

A. Yes, sir.

Q. Have or have not sidings been removed that heretofore existed within this space or territory?

A. I don't remember of any.

Q. How about 31st and Haverford? Has not that siding been removed?

A. No, sir; that siding is there yet. We use that for passenger trains.

Mr. TODD:

Q. The siding that went into the old drove-yard, has not that been taken out, that belonged to Mr. Glass?

221 A. Yes, sir; that was taken out when the present tracks were put down.

Mr. BIDDLE:

Q. Where was that track of Mr. Glass'?

A. That was at the Spring Garden Street bridge; where Spring Garden street crosses the railroad.

Q. That came from the drove-yard?

A. Yes, sir.

Q. That was a freight siding?

A. Yes, sir.

Q. That siding has been taken out?

A. Yes, sir; the passenger tracks are running where that siding was.

Q. That has been taken out?

A. Yes, sir.

Q. Has any other siding been taken out?

A. None that I remember.

Q. No freight siding has been put in the place of the one taken out from Glass?

A. No, sir.

Cross-examination by Mr. MACVEAGH:

Q. You have already said that there is a freight siding right opposite this property into the gas works?

A. Yes, sir; on the south side.

Q. Is there a track at the 21st-street station leading to the main tracks?

222 Mr. BIDDLE: I object to anything about the 21st-street station. I have not been allowed to ask anything about it.

Mr. MACVEAGH: I am not asking about the station.

Mr. BIDDLE: It is not cross-examination. I have not said a word about it.

Mr. MACVEAGH: You asked if there was any switch between Market street and Girard avenue. I am on that territory and do not propose to go out of it.

The COURT: He is only asking that as a particular designated point.

Mr. MACVEAGH:

Q. Is there a track leading from these tracks at 21st street to the 21st-street tower?

A. There is a track leading from the passenger system—from the passenger system out onto the main tracks at 21st-street tower.

Q. What is that used for?

A. It is used for empty passenger cars.

Q. For shifting trains—for shifting purposes?

A. Yes, sir.

Q. Precisely the same use that any siding would be put to along there?

A. Yes, sir.

Q. If you had a siding opposite this property at 21st street
223 would you use it for shifting of freight cars?

A. Yes, sir.

Q. Is there any track on either side of the system between Girard avenue that comes in or goes out from it?

A. From the main tracks?

Q. Yes.

A. No, sir.

Q. How does the P., W. & B. passenger business come in?

A. They come in by the way of the tunnel—the Market-street tunnel.

Q. How do they get onto this Filbert Street Branch; how do they go out of the depot?

A. They cross over the main track at 20th street.

Q. They go on a track from this track?

A. Yes, sir.

Q. Separate from this track?

A. Yes, sir.

Q. Just as a siding would be for any purpose?

A. The same thing.

Q. The track is broken in precisely the same way it would be broken by siding.

A. Exactly.

Q. At Powelton avenue what is the fact as to the breaking of the tracks?

224 A. That crosses over from what we call the middle siding to the yard—crosses over both main tracks.

Q. Both main tracks are there broken?

A. Yes, sir.

Q. For the substantial purposes of the siding?

A. Yes, sir.

Q. From which you run into the passenger depot there?

A. Yes, sir.

Q. At 36th street is there not a break in the track?

A. Yes, sir; crosses both the main tracks there—both the New York Division and the main line.

Q. Just east of the Girard-avenue station is there not another break in the track?

A. Yes, sir; there is a crossing switch just east of the bridge.

Q. Is there or not a very important siding at 30th street running down into the West Philadelphia yard?

A. Yes, sir; there is a siding runs to the West Philadelphia yard; branches off right at 30th street. There is one branches off there into the round-house.

Q. Are those extensively used?

A. Yes, sir.

Q. Frequently and constantly?

225 A. Yes, sir; used about one hundred times a day—each of them.

Q. In these breaks in the tracks of which I have been speaking they are run from the front of the switch?

A. Yes, sir.

Q. If a siding were put into this property it would run on the trail of the switch?

A. Yes, sir.

Q. That would be much safer?

A. Yes, sir.

Q. Because there is much less danger?

A. Yes, sir.

Q. That is, the siding you put in for the gas works is a much less dangerous siding than the breaks in your own siding going into your own depot from the yard?

A. Yes, sir.

Redirect examination by Mr. BIDDLE:

Q. I want to understand about this siding at 21st street—where it begins and where it ends—but am first going to ask you this question: Is not the use of that siding, however it is located, for the use of your passenger trains?

A. It is used for empty passenger cars and empty engines.

Q. It is used for shifting, is it not?

226 A. Yes, sir.

Q. Describe as closely as you can where it begins, what point east or west of 21st street, and where it comes back to the main track, if it does come back; where does it begin taking the western-most point?

A. The two main tracks run through the centre of the yard, and this track that we speak of begins about at the 17th-street tower, the east end of it, and the west end is located about one hundred and fifty or two hundred feet east of the 21st-street station.

Q. That is to say, that at or near 17th street it goes out of the main track and comes into it about 21st street?

A. Yes, sir.

Q. I show you now a plan of the streets and road, marked X, C, H, G. The siding you spoke of begins at a point on the passenger track south of Filbert street, a little to the west of 17th. Is that right?

A. That is correct.

Q. You have traced a line still going south of Filbert street on the company's private property until it unites a little west of 21st street, near Shock street, with the track as it makes the switch
227 in the Filbert street; but the point of union is still, though, near Filbert street, not in it. Am I right about that?

A. You are right about that.

Q. That is for the passenger traffic by shifting the empty cars and helping make up trains, isn't it?

A. Yes, sir.

Q. I presume the jury understands, but I want you to repeat it, that as you control the Baltimore road as it lessens you must turn off south when you cross the Schuylkill to get onto that road, which would be through the tunnel to what is called the Junction road. That is so, is it not?

A. Yes, sir.

Q. And of course you leave the main stem of your Pittsburgh tracks a little west of 30th street. Isn't that so?

A. Yes, sir; right at 30th street.

Q. A little west of 30th street to go south to get under the tunnel?

A. Yes, sir.

Q. That is a passenger track, of course?

A. Yes, sir.

Q. You have a block station there to regulate it?

A. Yes, sir.

Q. You spoke of another deflection of the track near Girard-
228 avenue bridge. That is for passenger purposes?

A. Passenger and freight. They use the south switch for freight very often.

Q. Where does that meet with the other end of the track?

A. That is a blind siding; it is not open.

Q. The end of the blind siding is still on your property?

A. Yes, sir.

Q. It is part of your road yard?

A. Yes, sir.

Q. It does not connect with any private property?

A. No, sir.

Q. That is a mere siding that does not return—running all the way on your own property. Am I right on that?

A. On the property of the Pennsylvania railroad?

Q. Yes.

A. I suppose so.

Q. It is in your road yard?

A. Yes, sir.

Recross-examination by Mr. MacVeagh:

Q. Are not there private switches leading off from this last siding of which you have spoken?

A. Girard avenue.

Q. There is one at the coffin works, is there not?
229 A. Yes, sir; a switch leading into that.

Mr. TODD: He was only asked east of Girard avenue.

Mr. BIDDLE:

Q. Is that at Girard avenue?
A. It is right at Girard-avenue station.

Mr. MACVEAGH: The siding comes from the siding you just spoke of. He answered as to this other siding. I want to show the private connections that are in this siding which you are now speaking of.

Q. There is one near the coffin works?
A. Yes, sir.
Q. There is another to the coal yard there?
A. Yes, sir.
Q. There is another to a second coal yard—a manure yard?
A. I don't know about that one. I know they haul lumber, coal, and most anything over there for private individuals.
Q. This siding that you speak of from 17th to 21st street is used to take in coal and ice and supplies needed at the Filbert-street station?
A. Yes, sir.
Q. As well as passenger cars?
A. Yes, sir.
Q. And the other, on the other side of 21st street, is used to take in coal at Bruner's?
A. Yes, sir.
230 Q. And to take into the Adams Express yard?
A. Yes, sir.
Q. And other freight?
A. Yes, sir.

Mr. BIDDLE:

Q. That is the south track, though?
A. Yes, sir.
Q. And that is the freight track; the freight tracks are south?
A. Certainly; it is on the south side.

Plaintiffs closed.

Testimony in Rebuttal on Behalf of Defendants.

GEORGE R. ROBERTS, having been duly sworn, was examined as follows:

Mr. MACVEAGH:

Q. You are the president of the Pennsylvania Railroad Company?
A. Yes, sir.
Q. And have been for several years past?
A. Yes, sir.
Q. You were subpœnaed in this case by the plaintiff?
A. So I was informed. I didn't see the subpœnæ.

Q. You are in the court-room in obedience to the summons?
A. Yes, sir.
Q. You are familiar entirely with the Filbert Street Branch of the Pennsylvania Railroad Company?
231 A. Yes, sir.
Q. You have been for many years of your life before you became president of this road or one of its executive officers a civil engineer?
A. Yes, sir.
Q. That was your profession in your early life?
A. Yes, sir.
Q. You followed it in the field in your early life for many years?
A. Yes, sir.

Mr. BIDDLE: I will admit Mr. Roberts is an expert in railroad business.

Mr. MACVEAGH:

Q. Please state what knowledge you have as to break in the tracks between the Filbert-street station and Girard avenue, say, or Overbrook.
A. In the passenger tracks?
Q. Yes.
A. There are several of them.
Q. Begin from the Filbert-street station and tell us all you can recollect.
A. There is a break in the incoming passenger track at 23rd street—the gas works siding. There is a break in the outgoing passenger track, on the north side of the outgoing passenger track, about 30th street for a connection with the lower yard round-
232 house. Then there are the connections between the passenger tracks for the purpose of getting into the old passenger station; also connections with the passenger track at Girard station, and I think there is a break in the passenger track for Heston's coal yard, just above it.

Mr. BIDDLE:

Q. 52nd street, further west?
A. No, sir; just west of 49th street.
Q. 30th street is west of the river, isn't it?
A. Yes, sir.

Mr. MACVEAGH:

Q. In your judgment is there any engineering difficulty?

Mr. BIDDLE: I object to that. We do not contend that is a mechanical difficulty. It is admitted that there is no mechanical difficulty in putting in a siding from the tracks of the defendant.

Objection withdrawn.

The WITNESS: There is no mechanical difficulty.

Mr. MacVeagh:

Q. Has there ever been any application for any siding to your company, from your knowledge?

A. Not to my knowledge?

Q. You would have been likely to know it if there had been?

A. Yes, sir.

233 Q. State whether or not, if there was adequate business offered to justify the employment of a siding, what the policy of the company would be in that respect and application made for it.

A. If the quantity and quality of the business is such as to justify sidings it is always granted where it is practicable.

Cross-examination by Mr. Biddle:

Q. Do you know of any sidings that have been granted to private parties (I do not speak of your own traffic) between Girard avenue and Merrick-street station?

A. The switch at the gas works.

Q. That is on the freight tracks—the south side?

A. That is used as a passenger track. I should say that that track is the most dangerous of the yard tracks there; it is used as the incoming and outgoing freight track and incoming passenger track; in other words, trains move in different directions. It is not a freight track solely; it is passenger and freight.

Q. It is not the main passenger track?

A. It is for the P., W. & B.

234 Q. Not for the Western and New York trains?

A. No, sir; the outgoing main-line passengers do not go on that track.

Q. Do the incoming Pittsburgh and New York passengers come in on that track?

A. No, sir.

Q. There is no switch granted to private parties, with that exception, between Girard-avenue station and Merrick station, is there?

A. No, sir; there has been no application. That is the only application we have had from Girard-avenue station to Merrick street, to my knowledge.

Q. Did not Mr. Glass *not* make an application to you for a private track? When I say to you I mean to the company.

A. Yes, sir; I think Mr. Glass made an application for a side track. I won't be positive that he had not a connection as a side track. He was declined, or, at least, I do not think he got a side track to connect his yard with the main tracks there, but there were other reasons probably more potent than the fact that it connected with the passenger track.

Q. He did not get it, as a matter of fact?

A. No, sir.

Q. There had been one there, or just about there, previously?

235 A. That was when the tracks were laid in a different manner.

Q. Do I understand you to say that if the owners of this prop-

erty should ask you now for a siding you would grant it to them?

A. Not without they would show some more evidence of making use of it than what they do at present.

Q. Their works are not now in use, as has been testified here in court. Supposing they were to resume business, and they made an application for a siding, do I understand you to tell us that you would grant it?

A. It would depend entirely upon the quantity and the character of their business. We always, as I said before, grant private sidings wherever they are practicable and wherever the business — of sufficient amount to warrant connection with the main track.

Q. That is answered with your usual judgment and caution, but I do not gather a great deal from it. You say wherever it is practicable and wherever the amount and kind of business justifies it. Assuming that they were carrying on business as they did before and had made this application, would you grant it in front of their property?

236 A. I have no knowledge whatever of the business they carried on before. I don't know whether they sent out a carload of goods in a week or a month or one hundred a day.

Q. What do you mean by practicable?

A. Wherever there is no absolute impracticability; where the thing can be done. For instance, I do not think we would grant a side track off the middle of the bridge in the Schuylkill river.

Q. Would it be part of your policy to grant it touching and going over this north track at Filbert and 23rd street?

A. If the business was of proper magnitude we would.

Q. You would grant it?

A. Yes, sir.

Q. What do you mean by proper magnitude?

A. Sufficient to warrant taking in a side track.

Q. You would reserve the right to judge yourself?

A. Yes, sir.

—. Then, of course, you would not make any agreement or say in advance that you would do so until you judge of the volume of business and of the practicability at the point at which it was asked, would you?

A. No, sir.

237 Mr. MacVeagh: The cause in the Glass case the jury are entitled to know. It related in part to the character of the business Mr. Glass proposed to carry on at 30th street, did it not?

A. Yes, sir. We did not desire Mr. Glass to have a side track at that point, because we wished to have all the pigs and cattle and sheep delivered at our own yard, and we made all the effort we could to prevent Mr. Glass having that siding.

Q. It was a matter of objection of the other people around 30th street?

A. Yes, sir. We made the same objection with the sheep-yard tracks above and fixed it up in a different way.

Mr. TODD:

Q. Mr. Glass' yard is still at 31st and Haverford, isn't it?
A. No, sir; the company bought the property.
Q. He still has a yard — 31st and Haverford?
A. No; the company bought Mr. Glass's property.
Q. They only bought a portion of it; a portion of it is used still as a drove-yard?
A. I don't know that.

238 Mr. MACVEAGH: I offer the proceedings before counsels when the defendant appeared before them with reference to the ordinance that has been given in evidence.

Objected to.

The COURT: It is the discussion of the matter in councils.

Mr. MACVEAGH: Not the councils' discussion. It is the presentation by the company's general solicitor at that time before councils when this bill was being asked.

Mr. MACVEAGH: I offer to prove that Hon. John Scott appeared on behalf of the Pennsylvania Railroad Company before the law committee of councils of the city, convened to consider the ordinance which has been offered in evidence by the plaintiff, the railroad committee having previously considered the subject and favorably acted upon it; but, in consequence of a question of law arising, it was referred to the law committee for further consideration. Mr. Scott, Mr. Roberts, Mr. Kneass, and others, representing the Pennsylvania Railroad Company, were present; and to prove that, Mr. Scott, as counsel for the company and on its behalf, claimed that the Pennsylvania railroad then possessed, by author-ative
239 grants from the Legislature of this State, undoubted right to build this branch without any authority whatever from councils of Philadelphia; that as proof of the character of those grants he read to the committee the 17th section of the charter of the company, the 11th section of the act authorizing the sale of the main line, with evidence that the company had purchased the main line under that act, and claimed that under this legislation there were two distinct powers, under either of which the defendants had the right to build the Filbert Street Extension now in question and referred to in said ordinance. Having thus shown clear legislative authority to construct the road, he stated the remaining question was, Has the company the right in constructing it to occupy the streets of the city to establish this road? citing the decision of the supreme court of the State, 12th Wright, page 355. He cited various other opinions showing that the company had the undoubted right to build the proposed road, and that the company had come before the councils only out of courtesy and in order to meet any allegation that might be made that it had arbitrarily and without proper respect for the municipal authorities settled the location of this road.

I offer this for the purpose of rebutting any presumption which
240 may possibly arise that the Pennsylvania Railroad Company in any manner became a party to the ordinance of the city

authorities referring to the construction of the structure complained of in this suit.

Objection sustained. Exception for defendant.

Mr. MacVeagh states that he desires to call Mr. Duncan to the stand with reference to his deeds which have been put in evidence.

Objected to as irrelevant.

GEORGE R. DUNCAN, having been duly sworn, was examined as follows:

By Mr. MACVEAGH:

Q. You are the plaintiff in this suit?

A. Yes, sir.

Q. In what right do you hold the title to this property?

Objected to.

Mr. MacVeagh offers to prove by the witness that he has no interest individually in the property mentioned in the deeds given in evidence, but that he holds it as a naked trustee for certain national banks for the city of Pittsburgh.

Objected to; objection sustained; exception for defendants.

Closed.

(Endorsed:) Duncan *v.* P. R. R.

241 And thereupon the counsel for the defendant presented to the learned judge the following points:

Points of Defendant.

The court is requested to charge the jury as follows:

First. Under all the evidence in this cause the plaintiff is not entitled to recover damages against the defendant for any alleged injury to his property by the construction of its Filbert Street Extension or Branch in the form of action adopted in this case, another remedy for any such damages having been given by the charter of the defendant and the supplements thereto in evidence.

Second. The defendant, under its charter and supplements in evidence, had full lawful authority to erect and operate the said Filbert Street Extension or Branch, and in doing so had the right to occupy Filbert street longitudinally without incurring any liability by reason thereof to the plaintiff as owner of property abutting upon said street.

242 Third. The defendant, as purchaser of the main line of the public works of this State under the act of Assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert Street Extension or Branch, and in doing so had the right to occupy Filbert street longitudinally without incurring any liability by reason thereof to the plaintiff as owner of property abutting upon said street.

Fourth. There is no evidence in this case that the defendant ever entered into any contract with the city of Philadelphia relating to the construction of said Filbert Street Extension or Branch or ever sought any authority from said city for said construction.

Fifth. Under all the evidence in this case the verdict must be for the defendant.

(Endorsed:) Duncan *vs.* P. R. R. Defendant's points.

243 And thereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY: In 1876 Mr. George R. Duncan, plaintiff in this case, became the owner by purchase at sheriff's sale of a property situate at the northwest corner of Twenty-third and Filbert streets, in this city, containing 231 feet on Filbert street and extending westward some 424 feet to the low-water mark of the Schuylkill river. This property had been owned by the Girard Tube Works, and the improvements consisted of a large main building on the south side of the lot, extending from Twenty-third street along Filbert street towards the river, together with coal sheds and other outbuildings.

In 1880 and 1881 the Pennsylvania Railroad Company built what is known as the Filbert Street Extension, crossing the Schuylkill river a short distance above Market street and ending at Broad street. It was opened for freight in April, 1881, and for passengers on the 5th of December, the same year.

244 From a point near Twenty-first street the properties on the south side of Filbert street were purchased, the buildings removed, and a substantial structure sustained by transverse arches erected, upon which the tracks were laid. From Twenty-first street west to the river the tracks were laid upon a structure of wooden and iron beams directly over the cart-way of the street, and sustained by iron pillars some eighteen inches square resting upon the footway inside of the curb-line. This is the case along the whole length of the south side of the plaintiff's property, the structure being some forty feet high and the railings or guards coming within one or two feet of the side of the building.

None of the plaintiff's property was actually taken by the railroad company.

This action is brought to recover damages for the injury which the plaintiff claims to have sustained in relation to this property by reason of the construction of the railroad.

245 The right to recover indirect or consequential damages against a corporation for injuries done to private property in the exercise of the right of eminent domain delegated to it by the State is a new one in Pennsylvania, being secured by the constitution of 1873. The liability of the corporation defendant here depends upon whether or not it is subject to the provisions of the new constitution. This is a question of law entirely, and as such will have to be determined in this case. I have decided to reserve it, and submit the case to you simply upon the question of damages.

The legal measure of the injury sustained by the plaintiff is the difference in value of the entire property before the road was built and after it was completed. The question for your consideration, then, is simply this: How much, if at all, was the market value of the plaintiff's property at Twenty-third and Filbert streets lessened by the building of this railroad? This is entirely a question of fact, and as such is entirely a question for you. I do not know that I can aid you in your consideration of it at all. You have had
246 the advantage of a very thorough, clear, and able presentation and argument of the testimony by the learned and eminent counsel who are engaged in the case.

The testimony on either side may be properly classed under two heads: The expert testimony in which you have been presented with the opinions of those who by knowledge and experience are specially qualified to speak on the subject, and that which has furnished you with facts from which you can draw your own deductions as to the injury sustained.

The plaintiff's witnesses substantially agree in placing the loss at $50,000. Mr. Gummey, Mr. Barry, and Mr. Fritz all place the value of the property before the road was built at $150,000; the land, at fifty hundred dollars per foot, on Filbert street, $115,000, and the buildings at $35,000. This estimate of the land and buildings as made by them is not made with reference to what they were worth to Mr. Duncan or to any other person for a particular use, but with reference solely to their value in the general market.

Mr. Gummey and Mr. Barry fixed the loss at $50,000; Mr. Fritz at twenty-five or thirty per cent. of the value, which is
247 $37,500 or $45,000; Mr. Ritter, whose deposition was read by the plaintiff, estimates the property at $125,000 and the loss at one-third, which is $41,666.

The defendant's witnesses, Mr. Ritchie, Mr. Boyd, Mr. Hutchinson, and Mr. Potter, likewise called as experts, fixed the value of the property before the road was built at from $75,000 to $80,000, and the depreciation in value as small, if anything at all. The expert testimony then leaves the limit as to depreciation all the way from nothing to $50,000.

As to the intelligence of the witnesses who have been called upon either side as experts, their peculiar knowledge of the subject of which they speak, and their entire fairness and good faith, there is no room for doubt. The difficulty of estimating correctly the market value of such a property as this is apparent. It can scarcely be said to have a market value in the ordinary sense of these words.

Small properties which frequently change ownership and for which at some price there is always a demand have something like a fixed market value. Large properties adapted only to special uses are without demand in the general market. There may be
248 a thousand purchasers for the one at a price somewhere near its value at any time. The other can only be sold at all under favorable conditions of trade and when some one of thousands who has the ability to buy is willing to take the risk. There is,

however, perhaps no better way of showing the market value of such a property than by testimony of this kind.

You have seen and heard these gentlemen and it is for you to determine upon the judgment of which of them you can most safely rely.

Aside from the testimony of those witnesses, you have the fact proved that in 1876 the south lot was sold at Thomas & Sons' auction for some $68,000. The whole property during the same year was sold at sheriff's sale for $69,000. The assessment of the property has ranged, from 1877 to 1883, from $45,000 to $55,000.

These figures, gentlemen, are at best but factors in the solution of the problem before you. The loss or depreciation caused by the defendant's road is what you are to ascertain, and this is to be measured by the difference in value before and after the road was built.

The elements of depreciation as set forth in the plaintiff's
249 testimony are the obstruction of light on the Filbert-street side of the property, the obstruction of the street and the consequent deprivation of its use, the creation of dust, dirt, and smoke, the continued noise and vibration, and the annoyance and danger from cinders and sparks.

The structure erected is some thirty feet above the roadway. It is within a foot or two of the side of the building, and over it some 450 trains pass every day. The effect of this upon the property you can probably as readily determine yourselves as any of the witnesses who have been called before you. All of these things, however, are to be taken into consideration in connection with the character of the property and its probable use and in connection with the character of the street and the location and the use of the street before the road was built.

In relation to the danger of fire from sparks and cinders you will remember that all testimony was excluded of single acts of negligence in running of engines, or of danger under peculiar circumstances, and the evidence was confined to what habitually oc-
250 curred because of the situation of the road—of what was a consequence of its operation—and not a mere accident in its management.

How far these disadvantages are co-nterbalanced by the advantages to this property by reason of the proximity of the railroad you should also carefully consider. Has the owner of this property been benefitted by the railroad? Is its market value increased by reason of the road being built where it is?

The defendants claim that the property can be connected with the railroad and thereby be made available for heavy manufactoring purposes, and that by reason of this its market value is increased. You will carefully consider the testimony upon this subject and give it such weight as in your judgement it merits.

Reference has been made to another railroad which is projected through this property. The East Side Schuylkill railroad intended to connect the Chester Branch of the Philadelphia & Reading Railroad Company with their main branch at Twenty-first — and Pennsylvania avenue. The impropriety of your considering that subject

at all must be apparent. The road has not been built and may never be built. If built it may benefit this property or it may ruin the property, I do not know which, and you are
251 not in a position to form a judgement upon the subject. If it injures the property the Pennsylvania Railroad Company is not responsible for that injury. If it benefits it the owner of the property and not the Pennsylvania Railroad Company should reap the advantages of that benefit. You should, therefore, dismiss that subject from your attention entirely.

If then, gentlemen, upon the whole case you find that the value of the plaintiff's property has been lessened by reason of the building of the defendant's road he is entitled to your verdict. If it has not been lessened you will find for the defendant. If you find for the plaintiff your verdict should be for the amount of the difference in the market value of the property before the road was built and after it was finished.

The court reserves for the consideration of the court in banc the first, second, and third points of the defendant and refuses to charge as requested in the defendant's fourth and fifth points.

Defendant's counsel excepts to that part of the charge referring to the jury the liability to fire as a consequence of the operation of the road as an element of damage.

252 And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court; and inasmuch as the said charge and opinion so excepted to do not appear upon the record the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereupon the aforesaid judge, at the request of the said counsel for the defendant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 30th day of Dec., A. D. 1884.

D. NEWLIN FELL. [SEAL.]

253 And after verdict for the plaintiff and within the time allowed by rule of court the counsel for defendant moved for judgment for defendant *non obstante veredicto* upon the reserved points.

Whereupon the said court refused said motion and entered judgment for the plaintiff on the point reserved. (Prout Minute Book, 1884, page 250.)

And thereupon the counsel for the defendant did then and there further except to the entry of judgment for the plaintiff on the reserved points; and inasmuch as the said motion for judgment *non obstante veredicto* and the refusal thereof and the entry of judgement on the points reserved in favor of the plaintiff do not appear upon the record the said counsel for the defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seals of the judges aforesaid should be put to the same,

according to the form of the statute in such case made and provided.

And thereupon the aforesaid judge, at the request of the said counsel for the defendant, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 30th day of December, A. D. 1884.

JAMES T. MITCHELL. [SEAL.]
D. NEWLIN FELL. [SEAL.]

254 Among the records of the supreme court of Pennsylvania in and for the eastern district it is thus contained:

Copy of Docket Entries, July Term, 1884.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiffs in Error,
vs.
GEORGE R. DUNCAN, Def't in Error. } No. 109.

Wayne MacVeagh.

Writ of error to the court of common pleas No. 2, of the county of Philadelphia, ret'ble the first Monday of January, 1885; exit June 16th, 1884.

Jan. 2nd, 1885, record returned and filed.

Eo die, assignments of error filed.

Jan. 30th, 1885, argued.

Feb. 15th, 1886, judgment affirmed. Opinion by Gordon, J. Paxson & Green, JJ., dissent.

Remittitur exit and with record sent to M. H. Todd, Esqr., Feb. 16, 1886.

Feb. 20th, 1886, petition for reargument filed.

Certificate of petition, etc., exit Feb. 23, '86.

March 22nd, 1886, reargument refused per *curiam.*

March 22nd, 1886, writ of error to the Supreme Court of the United States.

255 *Surwrit of Error to the Court of Common Pleas No.* 2, *for the County of Philadelphia, of June Term,* 1881.

In the Supreme Court of Pennsylvania, for the Eastern District.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
GEORGE R. DUNCAN, Defendant in Error. } No. 72.

Issue writ of error to the court of common pleas No. 2, for the county of Philadelphia, to remove record and proceedings in a certain action in said court, No. 72, June term, 1881, in which said

George R. Duncan was plaintiff and the said The Pennsylvania Railroad Company defendant, returnable to next term, *sec. reg.*

WAYNE MacVEAGH,
Att'y for Plaintiff in Error.

W.

To Charles S. Greene, proth'y sup. c't.

COUNTY OF PHILADELPHIA, *ss:*

Edmund Smith, being duly sworn, saith the writ of error applied for and purchased in above-entitled case is not intended for delay.

EDMUND SMITH.

Sworn and subscribed this 14th day of June, A. D. 1884.

[NOTARIAL SEAL.] A. P. BURCHELL,
Notary Public.

256 In the Supreme Court of Pennsylvania, for the Eastern District.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
GEORGE R. DUNCAN, Defendant in Error. } No. 72.

Surwrit of error to the court of common pleas No. 2, for the county of Philadelphia, of June term, 1881.

We, the Pennsylvania Railroad Company and the Philadelphia Trust, Safe Deposit, and Insurance Company, severally acknowledge to owe the above-named George R. Duncan the sum of forty thousand dollars upon condition that the above-named Penna. R. R. Co. prosecute its writ of error with effect, and if judgment be affirmed or the writ of error be discontinued or non-prossed that it pay the debt, damages, and costs adjudged or accruing upon such judgment and all other damages and costs that may be awarded upon such writ of error and for the return to the court below of the record with the remittitur or else we will do it for —.

[Seal of Pennsylvania Railroad Company.]

THE PENNSYLVANIA RAILROAD CO.,
By EDMUND SMITH, *First Vice-President.*

Attest: JNO. C. SIMS, JR., *Secretary.*

[Seal of Philadelphia Trust, S. D., & Ins. Co.]

THE PHILADELPHIA TRUST, SAFE DEPOSIT, AND INSURANCE COMPANY,
J. L. ERRINGER, *Pres't.*

Attest: W. L. DUBOIS, *Secretary.*

Taken and acknowledged this 16th day of June, A. D. 1884.

HAROLD P. NEWLIN,
Dep. Proth'y.

257 [Endorsed:] 109. July term, 1884. The Pennsylvania Railroad Company, plaintiff in error, *versus* George R. Duncan, defendant in error. Præcipe & recognizance. Filed June 16th, 1884.

258 EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the justices of the common pleas court No. 2, for the county of Philadelphia, Greeting:

Because in the record and process and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between The Pennsylvania Railroad Company, plaintiff in error, and George R. Duncan, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the said plaintiff in error we have received information, we, willing that, if any error be therein, it should be corrected and speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Philadelphia, in and for the eastern district of said Commonwealth, on the first Monday of January next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable Ulysses Mercur, doctor of laws, chief justice of our said supreme court, at Philadelphia, the sixteenth day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of the Commonwealth the one hundred and eighth.

[SEAL.] HAROLD P. NEWLIN,
Pro Prothonotary.

259 [Endorsed:] 72. June term, 1881. C. P. No. 2. No. 109. July term, 1884. Supreme court. The Pennsylvania Railroad Company, plaintiff in error, *vs.* George R. Duncan, defendant in error. Writ of error to the court of common pleas No. 2, for the county of Philadelphia. Returnable the first Monday of January, 1885. Rule on the defendant in error to appear and plead on the return day of the writ. Filed in supreme court Jan. 2, 1885. Brought into office Nov. 17, 1884. Jas. W. Fletcher. Wayne MacVeagh.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

J. I. CLARK HARE. [L. S.]
D. NEWLIN FELL. [L. S.]

I certify that the Pennsylvania Railroad Company, the Philadelphia Trust, Safe Deposit, & Ins. Co. are bail in error in the within case in the sum of forty thousand ($40,000) dollars.

HAROLD P. NEWLIN,
Pro Prothonotary.

260 (*Copy of Assignments of Error.*)

July Term.

DUNCAN *vs.* P. R. R. } No. 109.

First. The court below erred in not affirming the second point of the defendant.

Second point. The defendant under its charter and supplements in evidence had full lawful authority to erect and operate the said Filbert Street Extension or Branch, and in doing so had the right to occupy Filbert street longitudinally without incurring any liability by reason thereof to the plaintiff as owner of property abutting on said street.

Second. The court below erred in not affirming the third point of the defendant.

Third point. The defendant, as purchaser of the main line
261 of the public works of this State, under the act of Assembly and deed in evidence had full lawful authority to erect and operate the said Filbert Street Extension or Branch, and in doing so had the right to occupy Filbert street longitudinally without incurring any liability by reason thereof to the plaintiff as owners of property abutting on said street.

Third. The court below erred in not affirming the fourth point of the defendant.

Fourth point. There is no evidence in this case that the defendant ever entered into any contract with the city of Philadelphia relating to the construction of the said Filbert Street Extension or Branch or ever sought any authority from said city for such construction.

Fourth. The court below erred in not affirming the fifth point of the defendant.

Fifth point. Under all the evidence in this case the verdict must be for the defendant.

Fifth. The court below erred in not entering judgment for the defendant *non obstante veredicto.*

Sixth. The court erred in not entering judgment for the defendant on the points reserved.

Seventh. The court below erred in directing judgment to be entered for the plaintiff.

262 Eighth. The court below, having admitted in evidence an ordinance of the city of Philadelphia approved October 15th, 1879, erred in rejecting the evidence offered by the defendant to prove that it was represented before the law committee of councils

of Philadelphia convened to consider the proposed ordinance given in evidence by the plaintiff in this cause, and that the defendant then and there asserted *their* unquestioned right, independant of any assent of the municipal authorities, to construct this Filbert Street Extension.

Bill of Exceptions.

Mr. MacVeagh offers to prove that Hon. John Scott appeared on behalf of the Pennsylvania Railroad Company before the law committee of councils of the city convened to consider the ordinance which has been offered in evidence by the plaintiff. The railroad committee had previously considered the subject and favorably acted upon it, but in consequence of a question of law arising it was referred to the law committee for further consideration.

Mr. Scott, Mr. Roberts, Mr. Kneass, and others representing the Pennsylvania Railroad Company were present; and to prove that Mr. Scott, as counsel for the company and on its behalf,
263 claimed that the Pennsylvania railroad then possessed, by author-ative grants from the Legislature of this State, undoubted right to build this branch without any authority whatever from the councils of Philadelphia; that as proof of the character of those possessions he read to the committee the seventeenth section of the charter of the company and the eleventh section of the act authorizing the sale of the main line, with evidence that the company had purchased the main line under that act, and claimed that under this legislation there were two distinct powers, under either of which the defendants had the right to build the Filbert Street Extension now in question and referred to in said ordinance. Having thus shown clear legislative authority to construct the road, he stated the remaining question was, Has the company the right in constructing it to occupy the streets of the city to establish this road? citing the decision of the supreme court of the State, 12th Wright, page 355. He cited various other opinions showing that the company had the undoubted right to build the proposed road, and that the company had come before the councils only out of courtesy and in order to meet any allegation that might be made that it
264 had arbitrarily and without proper respect for the municipal authorities settled the location of this road. I offer this for the purpose of rebutting any presumption which may possibly arise that the Pennsylvania Railroad Company in any manner became a party to the ordinance of the city authorities referring to the construction complained of in this suit.

Ninth. The court below erred in not affirming the first point of the defendant.

First point. Under all the evidence in this cause the plaintiff is not entitled to recover damages against the defendant for any alleged injury to his property by the construction of its Filbert Street Extension or Branch in the form of action adopted in this cause, another remedy for any such damages having been given by the charter of the defendant and the supplements thereto in evidence.

Tenth. The court below erred in rejecting the evidence offered by the defendant to prove that the plaintiff had no interest individually in the property in controversy, but that he held it as a naked trustee for certain national banks located in the city of Pittsburgh.

Bill of Exceptions.

Mr. MacVeagh offers to prove by the witness, the plaintiff
265 in this suit, that he has no interest individually in the property mentioned in the deeds given in evidence, but that he holds it as a naked trustee for certain national banks of the city of Pittsburgh.

WAYNE MACVEAGH,
For Pl'ff in Error.

W.

(Copy of endorsement:) Supreme court of Penna. No. 109. July T., 1884. Duncan *vs.* Penna. R. R. Co. Assignments of error. Filed Jan. 2, 1885. MacVeagh.

266 (*Copy of Opinion.*) *Filed Feb.* 15, 1886.

PENNSYLVANIA RAILROAD COMPANY *v.* GEORGE R. DUNCAN.

Error to the common pleas No. 2, of the county of Philadelphia. Argued January 30th, 1885.

GORDON, *J.:*

We fully agree with all that has been said by the learned counsel for the plaintiff in error as to the inviolability of the charter of the Pennsylvania Railroad Company. We not only now assent, as we always have done, to the principle announced by the Supreme Court of the United States in the Dartmouth College case, but are perfectly aware that, whether we so assent or not, we must, as a subordinate jurisdiction, give to that case its proper effect. We also agree that the framers of the constitution of 1874 did not intend to violate the laws of the Federal Government or to repeal the provisions of any charter theretofore granted by the Legislature of Pennsylvania. It follows that a protracted discussion of these points would subserve no valuable purpose. Nevertheless it seems to us as of no avail to deny the plain and obvious reading of the 8th section, article
267 16, of the present constitution: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction." It is admitted that the then existing municipal corporations are included in this provision, and that no language is elsewhere found in the constitution or its schedule which exhibits an intention to exclude them from the restrictions thus imposed. But, confining ourselves to the words of this section, we are unable to comprehend the force

of the reasoning which would exclude "other corporations" from the conditions to which their immediate correlatives have been subjected. Moreover, if we have regard only to the grammatical structure of the sentence, the doubt would be not as to the intention to embrace corporations then existing, but rather future ones. The word "invested," standing, as it does, alone, has undoubtedly a present signification, and cannot be made to embrace the future but by the addition of some verbal auxiliary. Thus, whilst we have no doubt of the design to apply the provisions of this section to
268 corporations which should thereafter be erected, yet we can by no possible construction exclude those then in being.

The answer, however, is that the section under discussion, by the express terms of the constitution itself, was not intended to apply to private corporations existing at the time it was framed, and the 10th section of article 17 is cited in support of this hypothesis. "The General Assembly shall not remit the forfeiture of any corporation now existing or alter or amend the same or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution." But we assume, without fear of contradiction, that the provision here stated was not intended to apply to those corporations which could not claim exemption from what we may call constitutional legislation—in other words, such as, from the nature of their charters, must necessarily come within the provisions of this new organic law. It would be folly to call upon such to accept that concerning which they have no choice. Therefore all corporations falling within the terms of the act of 1855 or the amendment of 1857 are, so far as the provisions
269 of that statute or that amendment extend, concluded by the action of the convention of 1873. Beyond this, however, its prescriptions neither did nor were intended to go, and so we have held in Hays *v.* The Commonwealth, 82 P. S. R., 518, and subsequent cognate cases. We may also add, in order to avoid the possibility of mistake, that the power of the convention was in this particular no greater than that of the Legislature. The defendant's charter must be regarded in the light of a contract and is in all particulars inviolable, unless in the charter itself or in some general or special law to which it was taken subject there is a power reserved to the General Assembly to alter or amend; and as in that case the Legislature might intervene to modify the charter of a corporation, so might the constitutional convention. Whence, then, did the Pennsylvania Railroad Company derive its authority to build the branch from the western side of the Schuylkill to 15th street? Certainly not from the act of 1846, for that act gave it a charter which embraced only the power to build and operate a road from Harrisburg to Pittsburgh, but rather, as the counsel for the defendant be-
270 low contends, from the act of 15th of May, 1857. This act, *inter alia*, reads as follows:

"That any company already incorporated by this Commonwealth becoming the purchaser of the said main line shall possess, hold, and use the same under the provisions of their act of incorpo-

ration and any supplement thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act in addition thereto."

This gave to the Pennsylvania Company a new charter containing all the privileges of that of 1846, and it was under the rights thus conferred that it built and now operates the branch in question. In this we, without hesitation, concur with the learned counsel for the defendant, who contends that the company was not driven to the necessity of resorting to the act of 1874 for power to build its branch, but possessed that right under the privileges conferred by the original charter, as extended by the act of 1867. The question here raised was fully discussed and settled in McAboy's appeal (argued at Pittsburgh Nov. 3, 1884), 11th Outerbridge, 548, and needs no further discussion. But if the defendant's charter dates from 1857, it would seem to be clear that it was taken
271 subject to the act of May 3, 1855, if not to the amendment of 1857, and, if so, that act must be taken as part of the charter. "Every charter of incorporation," says the statute, "granted or to be granted, shall be deemed and taken to be subject to the power of the Legislature, unless expressly waived therein, to alter, revoke, or annul the same whenever in their opinion it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the corporators, and as fully as if the reservation of said power had been therein expressed."

That under this act the Legislature has the power to alter all charters granted subsequently to its passage there can be no doubt, and no reason has been given why the charter of the defendant should be exempted from its provisions. The allegation that it was so exempted by reason of its purchase of the main line of the public works cannot be sustained, for we find nothing of the kind in the act relative to the sale of those works. By that purchase it got, in addition to its right to hold and operate the main line of the
272 State improvement, what was equivalent to a new charter, by which powers not conferred by the sale itself were vested in it, and surely it took those powers subject to the act of 1855.

The conclusion here stated cannot be avoided but by showing that the new grant was accompanied by an express renunciation of legislative jurisdiction. Nor must we pass unnoticed the fact that this company accepted as part of its charter the act of the 15th of April, 1868, and so became subject to the constitutional amendment of 1857, and, as a consequence, to the legislative power of the General Assembly. We thus find that the legal status of the Pennsylvania Company at the time of the adoption of the constitution of 1874 was in all respects similar to that of the Monongahela Navigation Company at the time of the passage of the act of 1844, so that we may regard the case of that company against Coon, reported in 6 Barr, 379, as decisive of the controversy in hand. The corporation here mentioned was erected in 1836 without the imposition of any conditions respecting such consequential damages as might result from the construction of its works. On the 24th of June, 1839,
273 a supplemental act was passed by which certain new priv-

ileges were granted to the company, and in the last section of that act the Legislature reserved to itself the right "to alter, amend, or annul the charter in such manner as to do no injustice to the stockholders." Now, we may pause here for the moment to observe the similarity of the language thus used to that found in the act of 1855 and the amendment of 1857, and to remark that this reservation of legislative power is as well part of the defendant's charter as it was that of the Monongahela Navigation Company." "Every charter of incorporation granted or to be granted shall be deemed and taken subject to the power of the Legislature, unless expressly waived therein, as fully as if the reservation of said power had been therein expressed." The similarity of the position of the two companies with reference to the subject-matter under consideration is thus rendered certain, and the decision which determines the liability of the one must also, if adhered to, settle that of the other. In 1842 Coon *et al.* brought their suit for damages resulting to them from the water backed by the defendant's dam on their mill-wheels, but the court refused to sustain this action for
274 the reason that this *locum-tenens* of the State was not liable for damages of this character. So the matter stood until 1844, when the General Assembly enacted "That the company shall make amends for any damages done or that may be done to lands and property on the Monongahela river or its branches or its tributary streams by overflowing the same. Under this act the plaintiffs brought a new action for the same damages as those claimed in the former suit, and it was held that they were entitled to recover.

It must here be observed that not only was the same defence open to the company in the case cited as that now urged for the defendant in the present contention, but to the further defence that the act of 1844 was retrospective in its operation and imposed damages for which the courts had previously declared the Navigation Company was not liable. Nevertheless, Chief Justice Gibson, who delivered the opinion of this court, thus disposes of the controversy:

"Now, it has already been determined that the case before us was not provided for in the original act of incorporation, and had it continued to stand on that foot the power of the State would have been incompetent to burden the company with charges not
275 originally imposed on it; but in 1879 it accepted a grant of further powers and privileges in consideration of an express reservation by the Legislature of the power 'to alter, amend, or annul the said charter of said company, at any time thereafter, in such manner that no injustice be done to said corporation;' and in execution of it they declared, in 1844, that the company 'shall make amends for any damage done or that may be done to lands or property lying upon the Monongahela river or its branches and tributary streams by overflowing the same.' It is evident that by accepting additional privileges and powers on the terms prescribed in the grant to them the company surrendered the inviolability of its contract to the discretion of the Legislature. How this discretion has been exercised it is not for us to say; but if we were bound to do so

we would promptly say that it has, in the words of the declaratory act, done no injury to the company."

We have thus a complete disposition of the case in hand without resorting to the argument, which to us seems fallacious, that the Constitution only provides a remedy for the enforcement of a pre-existing right; hence does not infringe the company's charter
276 powers. The error discoverable in this position is that there was no such pre-existing right as against the Commonwealth and those upon whom she had conferred the right of eminent domain, and so it was held by all the cases from Shrunk *v.* The Navigation Company down to The Lycoming Gas and Water Co. *v.* Moyer, 3 Out., 516.

On the other hand, whilst this provision does not in terms abridge the defendant's right of eminent domain, yet it does encumber the exercise thereof and thus alters or modifies its charter. We therefore rest our decision on what we deem its legitimate ground—that is, that the act of 1855 and the constitutional amendment of 1857 must be taken to be as much part of the defendant's organic law as though written therein and as a consequence as well the constitutional convention as the Legislature had the power to subject the company's exercise of the right of eminent domain to the provision that it make just compensation not only for the property which it might choose to take in the strict sense of that word, but also for such as it may injure or destroy. What we have already said substantially disposes of all the assignments of error except the
277 ninth and tenth, and they are comparatively unimportant.

It is certainly idle to urge that a remedy is given in the defendant's charter for the injury here complained of, when throughout the case the contention on part of the company has been that no means of redress for such injury exists either in or out of the charter. Moreover, it is not pretended that the constitutional provision which requires compensation for property injured before such injury has been complied with either by payment or security. The case thus falls within the doctrine announced in Dimmick *v.* Broadhead, 25 P. F. S., 464, and M'Clinton *v.* The Railroad Co., *ibid.*, 404. The tenth assignment is answered by saying: Where the legal estate is vested in a trustee all actions at law which affect the trust estate must be brought in his name. Perry on Trusts, 3d ed., vol. 1 sec. 328. To prove, therefore, that the plaintiff in the suit in hand had individually no interest in the property, but held only as trustee for certain national banks in the city of Pittsburgh, could have no result legitimately helpful to the defendant's case.

The judgment of the court below is affirmed.

278 PAXSON, *J.*, & GREEN, *J.*:

We dissent. We are unable to see how the State can avoid its solemn contract by amending its constitution.

A true copy of the opinion in the above-entitled case; certified from the record March 23rd, 1886.

[SEAL.] CHAS. S. GREENE,
Prothonotary.

(Endorsed:) S. C., eastern district. No. 109. July term, 1884. Penna. R. R. Co. *vs.* George R. Duncan. Filed Feb. 15, 1886.

279 EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the justices of the common pleas court No. 2, for the county of Philadelphia, Greeting:

Whereas by virtue of our writ of error from our supreme court of Pennsylvania, for the eastern district, returnable in the said court on the first Monday of January, in the year of our Lord one thousand eight hundred and eighty-five, a record was brought into the same court of a judgment rendered against the Penna. R. R. Co., plaintiff in error, at the suit of Geo. R. Duncan, defendant in error, in a certain plea of — which was in your said court by our writ of error; and it was so proceeded in our said supreme court that the said judgment was affirmed, and the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of Assembly in such cases made and provided) ordered by the said supreme court to be remitted to the common pleas court No. 2, for the county of Philadelphia aforesaid, as well for execution as otherwise as to justice shall appertain: Wherefore we hereby remit you the record of the judgment aforesaid and the proceedings thereupon in order for execution or otherwise as aforesaid.

Witness the Honorable Ulysses Mercur, doctor of laws, chief justice of our said supreme court, at Philadelphia, the 16th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

[SEAL.] HAROLD P. NEWLIN,
Pro Prothonotary.

280 [Endorsed:] 72. (C. P. No. 2.) J., '81. No. 109. July term, 1884. Supreme court. Penna. R. R. Co., plaintiff in error, *vs.* Geo. R. Duncan, defendant in error. Remittitur. Att'y, pro., 3; 7.25; rem., .75. Filed Feb. 17, 1886. C. B. Roberts, pro. proth'y. M. H. Todd.

281 (*Copy of Petition for Reargument.*)

In the Supreme Court of Pennsylvania, Eastern District.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
GEORGE R. DUNCAN, Defendant in Error.

The plaintiff in error in the above-entitled case prays the court to permit a reargument thereof for the following reasons:

First. Because it has been decided or conceded, in the opinion of the majority of the court, that article 16, section 8, of the constitution of 1874 could not of itself create a liability on the part of corporations chartered previously to 1855 for con*con*-quential damages arising out of the exercise of the power of eminent domain.

Second. Because the deed of the Commonwealth conveying its main line and the privileges therewith associated, August 1, 1857, cannot be properly held to have subjected the charter of the purchaser to the provisions of the act of 1855, to which no allusion whatever was made in such deed or in the act of Assembly
282 authorizing it, nor was any consideration whatever passed or pretended to pass from the Commonwealth to the purchaser which would justify a presumption that the purchaser was parting with any portion of the chartered privileges it theretofore possessed. On the contrary, the express words of the act of Assembly provided that the privileges annexed to the main line should be held by the purchaser in addition to the chartered rights it theretofore enjoyed.

Third. Because the acceptance by the plaintiff in error of the act of April 4, 1868, did not affect the chartered rights of the plaintiff in error except to the extent stated in the 4th section of that act.

Fourth. Because in the case of the Navigation Company against Coon, 6th Barr, 379, upon which the court has rested its decision in this case, the act of 1839, by which certain new privileges were granted to the said Navigation Company, provided as a condition of the acceptance of the act and enjoyment of the privileges therein conferred that the whole charter should be subject to alteration, amendment, or annulment by the Legislature, whereas neither the act of 1855 nor the constitutional amendment of 1857 meant
283 for a moment to impose upon all companies incorporated before that time, as to whom any subsequent beneficial legislation was had, an acceptance of the result that their whole charters became thereby subject to legislative control. It is respectfully submitted that the act of 1855 and the amendment of 1857 meant only to provide that as to any charters thereafter granted such charters were subject to the control of the Legislature to the extent pointed out in said act and amendment. They left the charters theretofore chartered protected as they had theretofore been.

In support of this position the court is respectfully referred to the case of Zimmerman *vs.* Turnpike Company, 32 P. F. Smith, 96, and especially to the case of Baker's appeal, recently decided by this court, in which the corporation had accepted numerous acts of Assembly subsequent both to the act of 1855 and the amendment of 1857, and yet its charter was held not to be subject to alteration by the constitution of 1874.

February 18th, 1886.

WAYNE MacVEAGH,
For the Pennsylvania Railroad Company.

284 (Copy of endorsement:) No. 109. July term, 1884. The Pennsylvania Railroad Company *vs.* George R. Duncan. Petition for reargument. Filed February 20th, 1886. Reargument refused March 22nd, 1886, per *curiam*. Filed March 22nd, 1886.

285 THE PENNSYLVANIA RAILROAD COMPANY
vs.
GEORGE R. DUNCAN.

To the Honorable Ulysses Mercur, LL.D., chief justice of the supreme court of Pennsylvania:

The petition of the Pennsylvania Railroad Company respectfully showeth—

That your petitioner brought suit in the supreme court of Pennsylvania, for the eastern district, entered to July term, 1884, No. 109, by writ of error to a judgment of the court of common pleas No. 2, of Philadelphia county, in a suit entered to June term, 1881, No. 72, and wherein one George Duncan was plaintiff and your petitioner was defendant, in which suit in said supreme court your petitioner was plaintiff in error and the said George Duncan was defendant in error.

That the said suit in the said court of common pleas No. 2, of Philadelphia county, was an action of trespass on the case brought by the said George Duncan against your petitioner to recover consequential damages alleged to have been sustained by the said Duncan through the construction and operation of the branch of the railroad of your petitioner in the city of Philadelphia known
286 as the Filbert Street Extension, adjoining or close to the property of the said Duncan, in which suit the said Duncan recovered a verdict against your petitioner for $20,000, upon which judgment was subsequently entered against your petitioner, to wit, June 16th, 1884; that on the fifteenth day of February, 1886, the supreme court of Pennsylvania, sitting at Philadelphia, ordered said judgment to be affirmed; and afterwards, on the fifteenth day of February, 1886, the said judgment was duly entered in the eastern district of Pennsylvania aforesaid; and on the 17th day of February, 1886, a remittitur from the said supreme court of Pennsylvania was filed in said court of common pleas No. 2, of Philadelphia county, certifying judgment affirmed. (A certificate of the prothonotary of the supreme court of Pennsylvania is annexed hereto showing that the above judgment was duly entered and that the record was duly remitted by the supreme court of Pennsylvania to the court of common pleas No. 2, of Philadelphia county, for lodgment there.)

That the said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania; that the judgment of the said court is final; that the right of the State of Pennsylvania, by an amendment of its constitution, to surcharge the price of a franchise previously granted by the said State to your petitioner and thereby to impair the obligations of a contract previously entered into by the State with the petitioner is the Federal question involved in the decision.

287 That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the clause in act 1, section 10, of the Constitution of the United States forbidding a State to pass a law impairing the obligation of contracts. (A printed copy of the record of the court below is hereto annexed, showing

the facts out of which the Federal question involved in this case arose.)

Your petitioner therefore prays for the allowance of a writ of error to the court of common pleas No. 2 of Philadelphia county, State of Pennsylvania, where the record lies, in order that the judgment of the said court may be re-examined and reversed or affirmed in the Supreme Court of the United States.

And it will ever pray.

THE PENNSYLVANIA RAILROAD COMPANY,
By G. B. ROBERTS, *President.*

Attest: JNO. S. SIMS, JR., *Secretary.*

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

George B. Roberts, president of the Pennsylvania Railroad Company, being duly sworn, deposes and says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

G. B. ROBERTS.

Sworn and subscribed before me this nineteenth day of February, A. D. 1886.

[SEAL.] A. B. BURCHELL,
Notary Public.

288 In the Supreme Court of Pennsylvania in and for the Eastern District. January Term, 1884.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
GEORGE R. DUNCAN, Defendant in Error. } No. 109.

Surwrit of error to the court of common pleas No. 2, for the county of Philadelphia.

February 15th, 1886, judgment affirmed. Opinion by Gordon, J. Paxson and Green, JJ., dissent: We are unable to see how the State can avoid its solemn contract by amending its constitution.

February 16th, 1886, remittitur exit, and with record sent to M. H. Todd, Esq.

Extract from the record.

In testimony whereof I have hereunto set my hand and the seal of said court, at Philadelphia, this nineteenth day of February, 1886.

CHAS. S. GREENE,
Prothonotary.

289 In the Court of Common Pleas Number Two, for the County of Philadelphia, of June Term, 1881.

GEORGE R. DUNCAN
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } No. 72.

I certify that on February 17th, 1886, the record in above cause was remitted from the supreme court of Pennsylvania for the eastern district and was lodged in this court.

EUGENE J. LINDSEY,
Pro Proth'y.

Endorsed: Pennsylvania R. R. Co. *vs.* Duncan. Petition for writ of error. The writ of error within prayed for is allowed March 22d, 1886. Ulysses Mercur, chief justice of supreme court. Filed March 24, 1886.

290 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania,

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original petition for writ of error, with allocatur of chief justice supreme court of Pennsylvania, in the case of The Pennsylvania R. R. Co., plaintiff in error, *vs.* George R. Duncan, defendant in error, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

W. VON A. WILLIAMSON,
Pro Clerk of C. C.

291 [Endorsed:] 72. C. P. No. 2. J., '81. No. —. Sessions, 188–. Circuit court United States, eastern district of Pennsylvania. Penna. R. R. Co., pl'ff in error, *vs.* Duncan, def't in error. Certified copy of petition for writ of error. Filed M'ch 25th, 1886. Jas. W. Fletcher, *pro* proth'y.

292 THE UNITED STATES OF AMERICA, *ss:*

To George R. Duncan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the prothonotary's office of the court of common pleas No. 2, for the county of Philadelphia, Commonwealth of Pennsylvania, wherein

the Pennsylvania Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

ULYSSES MERCUR,
Chief Justice of the Supreme Court of Pennsylvania.

293 STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

On the twenty-fifth day of March, in the year of our Lord 1886, personally appeared before me, the subscriber, a notary public in and for the State of Pennsylvania, resident in Philadelphia, Butler Kenner Harding, and makes oath that he served the within citation by delivering a true copy thereof to M. Hampton Todd, Esq., attorney for defendant in error.

BUTLER KENNER HARDING.

Sworn and subscribed the day and year aforesaid.

[Seal Abram H. Wintersteen, Notary Public, Philadelphia, Pa.]

ABRAM H. WINTERSTEEN,
Notary Public.

294 [Endorsed:] 72. C. P. No. 2. J., '81. The Pennsylvania Railroad Company, plaintiff in error, *vs.* George R. Duncan, defendant in error. Citation to defendant. Filed M'ch 25, 1886. Jas. W. Fletcher, *pro* proth'y.

295 Know all men by these presents that we, The Pennsylvania Railroad Company and The Philadelphia Trust, Safe Deposit, and Insurance Company, are held and firmly bound unto George R. Duncan in the full and just sum of forty thousand dollars, to be paid to the said George R. Duncan, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of March, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at a court of common pleas No. 2, of Philadelphia county, State of Pennsylvania, in a suit depending in said court between George R. Duncan, plaintiff, and The Pennsylvania Railroad Company, defendant, judgment was rendered against the said The Pennsylvania Railroad Company, and the said judgment was affirmed by the supreme court of Pennsylvania, and the said plaintiff in error having obtained a writ of error to the Supreme
296 Court of the United States and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George R. Duncan,

citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of this obligation is such that if the said Pennsylvania Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to be and remain in full force and virtue.

THE PENNSYLVANIA RAILROAD COMPANY,
By G. B. ROBERTS, *President.*

Attest: JNO. C. SIMS, JR., *Secretary.* [SEAL.]

THE PHILADELPHIA TRUST, SAFE DEPOSIT AND INSURANCE COMPANY,
J. L. EWINGER, *Pres.* [SEAL.]

Attest: W. L. DU BOIS, *Secretary.*

Sealed and delivered in presence of—
Witness-:
HAROLD P. NEWLIN,
Pro Proth'y of Supreme Court, E. D.
A. H. WINTERSTEEN.

Approved by—
ULYSSES MERCUR,
Chief Justice of Supreme Court of Pennsylvania.

297 (Endorsed:) 72. J., '81. C. P. No. 2. Penna. R. R. Co. *v.* Duncan. Bond surwrit of error. Filed M'ch 25, 1886. Jas. W. Fletcher, *pro* proth'y.

298 *Assignment of Errors.*

In the Supreme Court of the United States.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
GEORGE R. DUNCAN, Defendant in Error.

And now, to wit, on the second Monday in October, 1886, before the justices of the Supreme Court of the United States, comes the Pennsylvania Railroad Company, by Wayne MacVeagh, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The supreme court of Pennsylvania erred in deciding that, notwithstanding the Pennsylvania Railroad Company was entitled by the terms of its charter, granted in 1846, to exercise thereafter
299 the right of eminent domain at the price of paying only for property actually taken, and was not required to pay for property injured but not taken, yet the price of the exercise of such franchise could be and was increased by the provisions of

the constitution of Pennsylvania, adopted in 1874, so that thereafter the said company should pay not only for property taken, but also for property injured but not taken.

2. The supreme court of Pennsylvania erred in its construction of the act of the General Assembly of Pennsylvania passed May 15th, 1857, as applied to the charter of the Pennsylvania Railroad Company, and in its construction of the deed of the Commonwealth to the Pennsylvania Railroad Company, August 1st, 1857, in pursuance of the provisions of the said act, in that by its said construction it permits the State to impair the obligation of the previous contract entered into between the said State and the said company by the grant of the charter of the company, approved April 13th, 1846.

3. The supreme court of Pennsylvania erred in holding that the Pennsylvania Railroad Company is subject to the provisions of the present constitution of Pennsylvania, adopted in 1874, whereby corporations are made liable for injuries to property not actually taken by the said corporations. The effect of its decision is that it permits the State to impair the obligation of the previous con-
300 tract entered into between the State and the said company by the charter of the company, approved April 13th, 1846.

4. The supreme court of Pennsylvania erred in holding that the acceptance by the Pennsylvania Railroad Company of the act of the General Assembly of Pennsylvania, passed April 4th, 1868, made it subject to the constitutional amendment of 1857 and to the act of the General Assembly of Pennsylvania, passed May 3rd, 1855, and, as a consequence, to the general legislative power of the General Assembly. The effect of the said decision of the said court is that it permits the State to impair the obligation of the previous contract entered into between the State and the said company by the charter of the company, approved April 13th, 1846.

5. The supreme court of Pennsylvania erred in deciding that the present case is ruled by the decision of the said court known as Monongahela Navigation Company *vs.* Coon, 6 Pa. St. Rep., 379. The effect of the said decision is that it permits the State to impair the obligation of the previous contract entered into between the State and the said company by the charter of the company, approved April 13th, 1846.

6. The court below erred in not reversing the judgment of the court of common pleas No. 2 of Philadelphia county for its
301 refusal to affirm the second point submitted at the trial of the cause in the said court.

Second point. The defendant, under its charter and supplements in evidence, had full lawful authority to erect and operate the said Filbert Street Extension or Branch, and in doing so had the right to occupy Filbert street longitudinally without incurring any liability by reason thereof to the plaintiff as owner of property abutting on said street.

7. The supreme court of Pennsylvania erred in not reversing the judgment of the court of common pleas No. 2 of Philadelphia county

for its refusal to affirm the third point of the defendant submitted at the trial of the cause in the said court.

Third point. The defendant, as purchaser of the main line of the public works of this State, under the act of Assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert Street Extension or Branch, and in doing so had the right to occupy Filbert street longitudinally without incurring any liability by reason thereof to the plaintiff as owner of property abutting on said street.

8. The supreme court of Pennsylvania erred in not reversing the judgment of the court of common pleas No. 2 of Philadelphia county for its refusal to affirm the fifth point of the defendant submitted at the trial of the cause in the said court.

Fifth point. Under all the evidence in this case the verdict must be for the defendant.

9. The supreme court of Pennsylvania erred in not reversing the judgment of the court of common pleas No. 2 of Philadelphia county for its refusal to enter judgment for the defendant *non obstante veredicto.*

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10. The supreme court of Pennsylvania erred in not reversing the judgment of the court of common pleas No. 2 of Philadelphia county for its refusal to enter judgment for the defendant on the points reserved.

11. The supreme court of Pennsylvania erred in not reversing the judgment of the court of common pleas No. 2 of Philadelphia county for its directing judgment to be entered for the plaintiff.

12. The supreme court of Pennsylvania erred in affirming the judgment of the court of common pleas No. 2 of Philadelphia county.

13. The supreme court of Pennsylvania erred in not reversing the judgment of the court of common pleas No. 2 of Philadelphia county.

And the said The Pennsylvania Railroad Company prays that the final judgment of the supreme court of Pennsylvania may be reversed, annulled, and set aside, and judgment be entered by the Supreme Court of the United States for the said The Pennsylvania Railroad Company.

WAYNE MACVEAGH,
Attorney for Plaintiff in Error.

303 [Endorsed:] 72. C. P. 2. J., '81. In the Supreme Court of the United States. Pennsylvania Railroad Company, pl'ff in error, *vs.* George R. Duncan, defendant in error. Assignment of errors and prayer for reversal. Filed June 5, 1886. R. F. Clay, *pro* proth'y. MacVeagh.

304 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of common pleas No. 2, for the county of Philadelphia, and to the court of common pleas No. 2, for the county of Philadelphia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea or action which lately was in the supreme court of Pennsylvania, being the highest court of law and equity of said State, the record and proceedings in which plea or action have been remitted and sent to the said court of common pleas No. 2, for the county of Philadelphia, by the said supreme court of Pennsylvania, which record and proceedings now remain with and on the file and in the office of the prothonotary of the said court of common pleas No. 2, for the county of Philadelphia, in which plea and action The Pennsylvania Railroad Company was plaintiff in error and
305 one George R. Duncan was defendant in error, wherein was drawn in question the validity of an authority exercised under the United States, and the decision was against its validity; and wherein was drawn in question the validity of a statute of or an authority exercised under said Commonwealth on the ground of their being repugnant to the Constitution, treaties, and laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution of and permission held under the United States, and the decision was against the title, right, privilege, and exemption specially set up or claimed under such clause of the said Constitution and permission, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, *and* that, the record and proceedings aforesaid being
306 inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Philadelphia, this 24th day of March, 1886, and in the one hundred and tenth year of the Independence of the said United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk Circuit Court of the United States,
Eastern District of Pennsylvania,
Per W. VON A. W.

307 [Endorsed:] 72. C. P. No. 2. J., '81. The Pennsylvania Railroad Company, plaintiff in error, *vs.* George R. Duncan, defendant in error. Writ of error. Brought into office March 25, 1886. Jas. W. Fletcher, *pro* proth'y.

308 STATE OF PENNSYLVANIA, } *ss:*
County of Philadelphia, }

I, William B. Mann, prothonotary of the courts of common pleas for the county of Philadelphia, do hereby certify that the foregoing is a true, perfect, and complete transcript of the record of the proceedings in this court and the supreme court of Pennsylvania in a cause and action wherein George R. Duncan was plaintiff and The Pennsylvania Railroad Company was defendant, as referred to in a writ of error from the Supreme Court of the United States to the court of common pleas No. 2, of Philadelphia county, and the said writ of error filed in this office on the 25th day of March, A. D. 1886, and the citation on such writ of error, together with the proof of service of the said citation, also filed in this office on the said day, and a certified copy of the petition for writ of error and endorsements thereon entered in the office of the clerk of the circuit court of the United States for the eastern district of Pennsylvania, which certified copy was also filed in this office on the said 25th day of March, A. D. 1886, and a true and correct copy of the bond executed on behalf of the plaintiff in error mentioned in said citation,
309 which bond remains on file in this office and was filed herein on the said day, and the assignment of errors and prayer for reversal upon said writ of error, filed in this office on the fifth day of June, 1886.

In testimony whereof I have hereunto set my hand and the seal of the said courts of common pleas of Philadelphia this 17th day of June, A. D. 1886.

[Seal Court of Common Pleas, Philadelphia, Penna.]

WILLIAM B. MANN, *Proth'y.*

Endorsed on cover: Pennsylvania, Phila., court of common pleas. No. 291. The Pennsylvania Railroad Company, plaintiff in error, *vs.* George R. Duncan. Filed June 22, 1886.

310 SUPPLEMENTAL TRANSCRIPT OF RECORD.

Supreme Court of the United States. October Term, 1888.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
P. H. MILLER, Administrator of George R. Duncan, Deceased. } No. 291.

In Error to the Court of Common Pleas No. 3 for the County of Philadelphia, State of Pennsylvania.

311 It is agreed that the following matter, being a portion of the evidence contained in the bill of exceptions and omitted from the transcript of record, be filed in the Supreme Court of the United States in the cause with the same effect as if upon return to a certiorari surdiminution of the record.

It is agreed that the same be printed as a supplemental record.

WAYNE MACVEAGH,
Att'y for Pennsylvania Railroad Company, Plaintiff in Error,
W. HAMPTON TODD,
Att'y for P. H. Miller, Administrator of Geo. R. Duncan, Defendant in Error.

312 An act to incorporate the Pennsylvania Railroad Company.

SECTION 11. That the president and directors of said company shall have power and authority, by themselves, their engineers, superintendents, agents, artisans, and workmen, to survey, ascertain, locate, fix, mark, and determine such route for a railroad as they may deem expedient, not, however, passing through any burying-ground or place of public worship or any dwelling-house without the consent of the owner or owners thereof, and not, except in the neighborhood of deep cuttings or high embankments or places selected for sidings, turn-outs, depots, engine, or water stations, to exceed four rods in width, and thereon to lay down, erect, construct, and establish a railroad with one or more tracks, with such branches or lateral roads as are hereinafter mentioned and with such bridges, viaducts, turn-outs, sidings, or other devices as they may deem necessary or useful, beginning at and uniting with the western terminus of the Harrisburg, Portsmouth, Mount Joy and Lancaster railroad, in the borough of Harrisburg, provided said Harrisburg, Portsmouth, Mount Joy and Lancaster Railroad company shall be subject to and consent to the same rate of tax and tonnage for the use of the State as is provided to be paid in this act by the Pennsylvania Railroad Company; and in case the said Harrisburg, Portsmouth, Mount Joy and Lancaster Railroad Company should
313 not agree to comply with these conditions within three months after the distance of fifteen miles from Harrisburg

westward shall *bona fide* be put under contract, the said Pennsylvania Railroad Company are authorized to connect their road with the Columbia railroad at or near the borough of Columbia, in Lancaster county, and thence by such direct practical route, with moderate gradients as will, in the opinion of the said president and directors, most conduce to the public interest and the interests of said company, having due regard to economy in the construction, maintenance, and management thereof, and terminating at such point or points in, at, or near the city of Pittsburgh or other place in the county of Allegheny, with authority to extend said road or branch thereof to the town or harbor of Erie, in the county of Erie, as to the said president and directors may seem most advantageous or expedient, and in like manner, by themselves or other persons by them appointed or employed as aforesaid, to enter into and appoint and occupy all land upon which the said railroad or depots, warehouses, offices, toll-houses, engine and water stations, or other buildings or appurtenances hereinbefore mentioned may be located, or which may be necessary or convenient for the erection of the same, or for any other purpose necessary or useful in the construction, maintenance, or repairs of said railroad, and therein and thereon to dig, excavate, and embank, make, grade, lay down, and construct the same; and it shall in like manner be lawful for the said company, their officers, agents, engineers, contractors, or workmen, with their implements and beasts of draft or
314 burden, to enter upon any lands adjoining or in the neighborhood of the said railroad so to be constructed, and to quarry, dig, cut, take, and carry away therefrom any stone, gravel, clay, sand, earth, wood, or other suitable material necessary or proper for the construction, maintenance, or repairing of said railroad or for the construction of any bridges, viaducts, or other buildings which may be required for the use, maintenance, or repairs of said railroad: Provided, That such compensation shall be made, secured, or tendered to the owner or owners of any such lands or materials as shall be agreed upon between the parties or in such manner as is hereafter mentioned: Provided further, That the timber used in the construction or repair of said railroad shall be obtained from the owners thereof only by agreement or purchase.

SEC. 17. That the said company shall not prevent any person or persons, being the owner or owners of land bordering on or adjacent to said railroad, from making lateral railroads and connecting the same with the railroad of the company for the purpose of transporting thereon their produce or other material, being the products of said land, the said connections being made at the expense of the person or persons wishing the same and according to the directions and subject to the approval of the directors of said company or their authorized agent; and it shall be lawful for the said company,
in the manner and subject to the conditions and provisions
315 hereinbefore provided in relation to the main line of their railroad by this act authorized to be made, to make such lateral railroads or branches leading from the main line of their said railroad to such convenient place or points, in either of the

counties into or through which the said main line of their road may pass, as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company.

Approved April 13th, 1846.

Laws of Pennsylvania, 1846, p. 312.

Act of 27 March, 1848.

SECTION 4. That when the Pennsylvania Railroad Company cannot agree with the owner or owners of any lands or materials for the compensation proper for the damage done or likely to be done to or sustained by any such owner or owners of such lands or materials which said company may enter upon, use, or take away in pursuance of the authority given them by the act to which this is a supplement, or by reason of the absence or legal incapacity of any such owner or owners no such compensation can be agreed upon, the court of common pleas of the proper county, on application thereto by petition, either by said company or owner or owners, or any one in behalf of either, shall appoint five disinterested persons of the next adjoining county or counties, none of whom shall be residents of any of the counties through which said railroad shall pass, and to fix a time, not less than twenty or more than
316 thirty days thereafter, for said viewers to meet upon the premises where the damages are allowed to be sustained, of which time and place ten days' notice shall be given by the party petitioning to said viewers and to the other party, and the said viewers having been first sworn or affirmed, by some power competent to administer oaths, faithfully, justly, and impartially to decide and true report to make concerning all the matters and things to be submitted to them and in relation to which they are authorized to inquire, in pursuance of the provisions of this act, and having viewed the premises, they shall estimate and determine the quantity, quality, and value of said lands so taken or occupied or to be taken and occupied, or the materials so used or taken away, or to be used or taken away, as the case may be, and having a due regard to and making just allowances for the advantages which may have resulted or which may seem likely to result to the owner or owners of said lands or materials in consequence of the opening or making of said railroad or the construction of works connected therewith; and, after having made a fair and just comparison of said advantages or disadvantages, they shall estimate and determine whether any, and if any [illegible], amount of damages have been sustained or may be sustained, and to whom payable, and make report thereof to the court, and if any damages be awarded and the report be confirmed by said court judgment shall be entered thereon, and, if the amount thereof be not paid, execution may issue thereon, as in other cases of debt, for the sum so awarded, and the costs and expenses incurred
317 shall be defrayed by said railroad company, and the said viewers shall be entitled to two dollars per day for each of them for the time necessarily employed in performing the duties

hereinbefore prescribed: Provided, That nothing herein contained shall authorize the said company to enter upon any lands or take any property without making compensation to the owners of said property or give adequate security therefor: And provided, That if either or all of the said judges of the court of common pleas aforesaid is or are interested in the said railroad as officers, stockholders, contractors, or otherwise, then the viewers aforesaid shall be selected and appointed by the sheriff and commissioners of the proper county, in like manner and with like powers as if appointed by the court of common pleas: Provided further, That if the proper officer of said county, at any time before application made by either party for the appointment of viewers, in the manner hereinbefore directed, shall tender to the owner or owners of said lands or materials a sum of money in full compensation for his or their said damages, said company shall not be liable for costs on any subsequent proceedings, unless such owner or owners of land or materials shall be awarded a larger sum than the previous tender of said company: Provided, That in all cases where proceedings have been instituted under the twelfth section of the act of the thirteenth of April, one thousand eight hundred and forty-six, the same shall be continued and proceeded in according to the provisions of the aforesaid act.

SECTION 5. That if said railroad company shall find it
318 necessary to change the site of any portion of any turnpike or public road they shall cause the same to be reconstructed forthwith, at their own proper expense, on the most favorable location and in as perfect a manner as the original road: Provided, That the damages incurred in changing the location of any road authorized by this section shall be ascertained and paid by said company in the same manner as is provided for in regard to the location and construction of their own road.

Approved the twenty-seventh day of March, one thousand eight hundred and forty-eight.

FR'S R. SHUNK.

Laws of Pennsylvania, 1848, p. 274.

Act of April 12, 1851.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the fifth section of the act entitled "A further supplement to an act to incorporate the Pennsylvania Railroad Company," passed the twenty-eighth of March, one thousand eight hundred and forty-eight, shall be so construed as to include the streets, lanes, and alleys in any town, borough, or city through which said road passes.

Approved the twelfth day of April, A. D. one thousand eight hundred and fifty-one.

WM. F. JOHNSTON.

Laws of Pennsylvania, 1851, p. 518.

319 An act for the sale of the main line of the public works.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That it shall be the duty of the Governor, within ten days after approving this act, to cause to be advertised daily, until the day of sale, in one or more newspapers of extensive circulation published in the cities of Philadelphia, Pittsburgh, Washington, Boston, New York, and in the borough of Harrisburg a notice that the main line of the public works will be exposed to public sale at the Merchants' Exchange or some other public place in the city of Philadelphia, on a day to be selected by him, not more than forty days after the
320 passage of this act. If a sale shall not be effected on the day fixed by the Governor it shall be lawful for him to adjourn the sale, from time to time, as he may deem expedient: Provided, That public notice of such adjournment shall be given in such newspapers as he may select: And provided further, That the last day fixed by adjournment for said sale shall not be less than twenty days before the meeting of the next Legislature.

SECTION 2. That at the time and place so selected it shall be the duty of the Governor to have offered at public sale the whole main line of the public works, to wit, the Philadelphia and Columbia railroad; the canal from Columbia to the junction at Duncan's Island; the Juniata canal from thence to Hollidaysburgh; the Allegheny Portage railroad, including the new road to avoid the inclined planes, and the canal from Johnstown to Pittsburgh, with all the property thereto appertaining or in anywise connected therewith.

SECTION 3. That it shall be lawful for any person or persons or railroad or canal company, now incorporated or which may hereafter be incorporated by and under the laws of this Commonwealth, to become the purchasers of the said main line of the public works for any sum not less than seven and a half millions of dollars; and, in the event of a sale of the said main line being made to individuals, it shall be lawful for such individuals so purchasing, after the said public sale, to assign and transfer their right to the said main line under said purchase to any railroad or canal company created by the laws of this Commonwealth; and such rail-
321 road or canal company, on compliance with the conditions of the said sale and on the payment or securing of the purchase-money of the said main line to the Commonwealth, as hereinafter provided, shall be fully invested with the right of the said purchasers and be entitled to the same rights and privileges as if the said main line had been struck off and sold to said company at the time of said public sale, and, if necessary, said company may increase their capital stock or borrow money and issue their bonds to any amount not exceeding fifty per centum above the amount of the purchase-money; and should any association of individuals become the purchasers of the said main line on the terms prescribed by this act the Governor is hereby authorized to grant them letters

patent incorporating the same into a body corporate in deed and in law under the name, style, and title of the Philadelphia and Pittsburgh Railroad and Canal Company, with all the privileges and subject to all the restrictions of an act regulating railroad companies approved the nineteenth day of February, one thousand eight hundred and forty-nine, and the supplements thereto, so far as is consistent with the provisions of this act: Provided, That no bid shall be accepted unless the bidder, or the company to whom he shall assign his said bid, shall, on the day of the sale, have deposited in the hands of the Governor, or some person duly authorized by him to receive it, the sum of one hundred thousand dollars in cash or State bonds, which shall be forfeited to the use of the Commonwealth if the terms of the sale are not complied with; and if
322 the party to whom the same shall be struck down shall not comply with the said conditions by the payment of one hundred thousand dollars as aforesaid, then it shall be the duty of the Governor, if deemed proper by him, to tender the same to the next highest bidder who shall comply with the said conditions: Provided, That said next bid is not less than seven million five hundred thousand dollars, or again expose the said main line to sale, as provided for by the first section of this act: And provided further, That if the Pennsylvania Railroad Company shall become the purchasers of said main line at said public sale or by assignment, as aforesaid, they shall pay, in addition to the purchase-money at which it may be struck down, and which shall not be less than the sum of seven and a half millions of dollars, the sum of one and a half millions of dollars, the whole amount of sale to be paid in the bonds of the company, bearing interest at the rate of five per centum per annum, payable semi-annually on the thirty-first day of January and July of each year, and which bonds, without further record, shall remain a lien upon the said main line; one hundred thousand dollars of which said bonds shall fall due on the thirty-first day of July, one thousand eight hundred and fifty-eight, and one hundred thousand dollars thereof annually thereafter until the thirty-first day of July, one thousand eight hundred and ninety, when one million of the residue shall fall due, and one million annually thereafter until the whole is paid; and upon the execution and delivery of said bonds to the treasurer of the State the Pennsylvania
323 Railroad Company and the Harrisburg, Portsmouth, Mount Joy and Lancaster Railroad Company shall, in consideration thereof, be discharged by the Commonwealth forever from the payment of all taxes upon tonnage or freight carried over said railroads; and the said Pennsylvania Railroad Company shall also be released from the payment of all other taxes or duties on its capital stock, bonds, dividends, or property, except for school, city, county, borough, or township purposes; and that it shall be lawful for the purchasers or their assigns either to purchase or lease, hold, and use the railroad of the Harrisburg, Portsmouth, Mount Joy and Lancaster Railroad Company, and to straighten and improve the said Philadelphia and Columbia railroad, and to extend the same to the Delaware river, in the city of Philadelphia; and it shall be further

lawful for them to alter, enlarge, and deepen the canal portion of said main line, and to make such additional locks and dams, and to make, in whole or in part, a slack-water navigation as may be deemed expedient; and in the event of a sale or lease as aforesaid by the Harrisburg, Portsmouth, Mount Joy and Lancaster Railroad Company the said company shall have the power to sell or lease, and the said purchasers or their assigns to buy or take on lease, said road and to make and receive, respectively, all such contracts, deeds, or assurances as may be requisite to carry the same into effect: Provided, That the right of the Commonwealth to enter upon, resume, and purchase the road of the Pennsylvania Railroad Company, as provided in their charter, shall thereafter cease and determine:

And provided further, That in case of the refusal of any
324 stockholder or stockholders of said company to comply with the provisions of this act, after the same may have been accepted by a majority of the stockholders of the company, it shall be lawful for the said company to pay the stockholder or stockholders so refusing the full market value of his, her, or their share or shares of stock, and such share or shares shall inure to the benefit of the company, to be disposed of by the directors for the benefit of the balance of the stockholders.

SECTION 4. That if the said main line of public works shall be sold to other parties than the Pennsylvania Railroad Company the purchaser or purchasers shall be entitled to a like credit upon the amount of said purchase-money, and for the performance of the conditions of said sale in behalf of the purchaser and for the security of the purchase-money to the Commonwealth the said purchase-money until paid shall remain a lien on said works, and the individuals or company purchasing as aforesaid shall within sixty days after said sale give a mortgage on the said main line of the public works and bonds for the amount of the purchase-money, and in addition thereto shall deliver within ten days after said sale to the Governor, for the use of the Commonwealth, bonds of the State of Pennsylvania or of the city of Philadelphia to the amount of one hundred thousand dollars, and within sixty days the additional amount of one million nine hundred thousand dollars, or in lieu thereof a like amount of first-mortgage bonds of the Pennsylvania Railroad Company, and payment of the principal of
325 such purchase-money shall be made in certificates of loan of the Commonwealth of Pennsylvania at par or in cash, and of the interest in cash semi-annually on the thirty-first days of July and January in each and every year upon any balance remaining due.

SECTION 5. That immediately after the said purchaser or purchasers or their assigns shall take possession of the same the said purchaser or purchasers or assigns shall be bound ever thereafter to keep up in good repair and operating condition the line of said railroad and canal extending from Hollidaysburgh to Philadelphia and so much of the Western Division as lies between Blairsville and Pittsburgh until the Northwestern railroad shall be open for business from Blairsville to the Allegheny river, with the necessary toll-

houses, water-stations, locks, buildings, and the other appurtenances; and the said railroad and canal shall be and remain forever a public highway, and the said purchaser or purchasers of the same shall furnish stationary and locomotive engines and motive power for the use of all persons or companies engaged or wishing to engage in the transportation of tonnage and passengers at such times and in such manner as not to impair the use and enjoyment of said railroads by such parties, they paying just and fair charges, which shall not exceed the rates of toll on the railroad prescribed in the charter of the Pennsylvania railroad, and the rates of toll charged upon the canal shall not be more than eighty per centum of those prescribed in the charter of the Union Canal Company, it being the true intent and meaning of this act that the said sections of canal and railroad and every part thereof, except as is
326 hereinbefore provided, shall be and remain a public highway, and kept open and in repair by the purchaser or purchasers thereof or assigns as such for the use and enjoyment of all parties desiring to use and enjoy the same: Provided, That said purchasers be authorized to grant, sell, and convey, or to lease for a term of years, upon such conditions as may be agreed upon, any portion of said canals, and any corporation or association of individuals authorized by this act to purchase the whole may purchase or lease such portions and hold the same subject to the conditions and entitled to all the privileges contained in this act: Provided, That if the said purchaser or purchasers or their assigns shall decide to abandon the Western Division or any part thereof, then they shall be required to lease the same to any party or parties who may desire to keep it open, the expense of keeping up the same devolving entirely upon the lessees and the purchasers or their assigns being forever exempt from any liability for keeping in navigable condition said Western Division: Provided further, That if the said purchaser or purchasers or their assigns shall decide to abandon the Western Division or any part thereof the said purchaser or purchasers or their assigns shall within not less than sixty days before such abandonment purchase from the owner or owners all the boats then in boating order on the said Western Division and all the cars and trucks then in running order on the Allegheny Portage railroad at a fair price and valuation, to be agreed upon by the
327 parties; and whenever the said purchaser or purchasers or their assigns and any of the said owners cannot agree upon the price and value of any of the said boats, cars, or trucks the parties so failing to agree shall each select one competent person, and they shall jointly select a third person; or, failing to agree in the choice of such third person, the two chosen as aforesaid shall select a third person, and the three persons so chosen shall value and appraise the property the price whereof could not be agreed upon as aforesaid, and their award shall be binding upon the parties.

SECTION 6. That the said purchasers may at any time before the maturity of said bonds, and after the giving to the commissioners of the sinking fund at least ninety days' notice of their intention so to do, pay off and satisfy the principal of said bonds or of any

one or more of them with interest until so paid at the prescribed rate, and shall then be entitled to receive back or be relieved from a proportionate amount of additional security hereinbefore provided for; and if at any time any one or more of said bonds or the interest due on the same be and remain unpaid for the space of ninety days from and after the maturity thereof and the falling due of such interest, then and in that case the Commonwealth shall have full power to re-enter upon and take possession of the property so transferred; and if the Legislature shall not be in session at the time of such default the Governor shall have full power to appoint one or more persons to take possession thereof in the name of the Commonwealth, and all payments made and the certificates of State
328 loans as aforesaid deposited with the State treasurer shall, upon re-entry as aforesaid, be forfeited to the Commonwealth, and the Governor shall sue out the mortgage, if any be taken from it against any other works of the purchasing company, by *scire facias* in the supreme court, wherever sitting, under which all the mortgaged works shall be sold, with the rights and franchises of the company, and conveyed to the purchasers by the treasurer of the Commonwealth, without charge for poundage, subject to any liens thereon at the time when mortgaged, which shall remain unaffected thereby.

SECTION 7. That as soon as the purchasers shall have made the payments and delivered the bonds in number and for amounts equal to and falling due at the time provided for the payment of the respective instalments, and shall have fully complied with the conditions of this act, then the secretary of the Commonwealth shall transfer, under the great seal of the State, to such purchasers, their successors or assigns, upon such terms and conditions as are mentioned in this act, the whole main line of public works between Philadelphia and Pittsburgh, consisting of the Philadelphia and Columbia railroad, the Allegheny Portage railroad, including the new road, to avoid the inclined planes, with the necessary and convenient width for the proper use of said railroads, the Eastern Division of the Pennsylvania canal, from Columbia to the Junction, the Juniata Division of the Pennsylvania canal, from the Junction to the eastern terminus of the Allegheny Portage railroad, and
329 the Western Division of the Pennsylvania canal, from the western terminus of the Allegheny Portage railroad to Pittsburgh, and including also the right, title, and interest of the Commonwealth in the bridge over the Susquehanna, at Duncan's island, together with the same interest in the surplus water-power of said canals, with the right to purchase and hold such lands as may be necessary to make the same available, and all the reservoirs, machinery, locomotives, cars, trucks, stationary engines, workshops, tools, water stations, toll-houses, offices, stock, and materials whatsoever and wheresoever thereunto belonging or held for the use of the same, and together with all the right, title, interest, claim, and demands of the Commonwealth of Pennsylvania to all property, real, personal, and mixed, belonging to or used in connection with the same by the Commonwealth: Provided, That the purchasers of said

main line shall take the same and its appurtenances subject to all contracts and arrangements heretofore made by act of assembly or otherwise for and in respect to the use of such works, and shall carry out the same with all persons interested therein in the same manner as the Commonwealth or its agents are now required to do by law.

SECTION 8. That as soon as the purchasers shall have given notice to the Governor of their readiness to take possession of said works he shall cause notice thereof to be given to all superintendents, toll-collectors, officers, and agents of the Commonwealth employed on or about said railroads and canals, who shall continue nevertheless to discharge the duties of their said offices or employments (at
330 the expense of the purchasers of said main line) until removed or reappointed, and the official bonds of said officers or agents shall inure to the use of said purchasers, as to all moneys received or acts done by them on account of said works subsequent to the time when said purchasers shall take possession as aforesaid.

SECTION 9. That it shall be lawful for said purchasers, their successors and assigns, and their officers, engineers, contractors, and agents, to enter upon any lands adjoining or in the neighborhood of the works, and dig, take, and carry away therefrom any materials necessary for the enlarging, making, altering, deepening, or improving said works or any portion thereof, or for constructing any railroad, canal, bridge, viaduct, dam, or other mechanical structure which may be required for the said works, or for making a slack-water navigation, or for improving any works already made: Provided, That compensation shall be made or secured to the owner or owners of any such lands or materials as shall be agreed upon between the parties; or if the said purchasers cannot agree with the owner or owners of such lands or materials, then the value of the same shall be ascertained according to the provision of the fourth section of the act entitled "A further supplement to an act to incorporate the Pennsylvania Railroad Company," approved the twenty-seventh of March, one thousand eight hundred and forty-eight.

SECTION 10. That said purchasers, their successors and as-
331 signs, shall have power and authority to own and employ locomotive engines, cars, boats, and horses, and to convey passengers and freight of whatsoever description, within reasonable time after possession is taken of said works or any portion thereof, and charge and receive tolls and fare for the passage and transportation of persons and freight; and said purchasers, their successors and assigns, shall have exclusive right to furnish all the motive power on said railroads: Provided, That all persons with cars, horses, boats, and freight may pass over said works, they paying tolls therefor, and the use of said works shall be governed by such general rules and regulations as said purchasers may from time to time ordain, establish, and publish, but no persons shall, without the consent of such purchasers, be permitted to use horses or other animal power on said railroads or steam on said canals: And provided, That no discrimination in tolls or charges or in priority of passage through the locks shall ever be made against any boats or

tonnage passing to and from the Susquehanna Division of the Pennsylvania canal: Provided, also, That the rate of toll on freight or tonnage passing over the said canal from the junction to Columbia, coming from the North and West Branch and Susquehanna canals, shall not at any time be greater than the toll now charged on the said canals, as per toll-sheet heretofore published by the canal commissioners for the year one thousand eight hundred and fifty-seven: And provided further, That the purchasers of the said main line shall at all times keep open the present connection at Columbia and Middletown with the Susquehanna and Tide Water and Union canals, and shall at no time discriminate against the trade or tonnage passing to or from the said canals; neither shall they at any time charge more for boats or other crafts passing the outlet locks at Columbia and Middletown than is now charged for the passage of boats or similar craft through other outlet locks owned by this Commonwealth.

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SECTION 11. That should any company already incorporated by this Commonwealth become the purchaser of said main line they shall possess, hold, and use the same under the provisions of their act of incorporation and any supplements thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act in addition thereto, and all provisions in said original act and any supplements inconsistent with the privileges herein granted shall be, and the same are hereby, repealed.

SECTION 12. That the entire proceeds of the sale of said main line shall be paid to the sinking fund and applied to the payment of the State debt according to the provisions of the act entitled "An act to provide for a sinking fund and to provide for the gradual and certain extinguishment of the debt of the Commonwealth," approved April tenth, one thousand eight hundred and forty-nine.

SECTION 13. That should it be ascertained at any time before the payment of the last instalment provided for that further legislation is required for passing to the purchasers, their successors and assigns, all the title and interests of this Commonwealth to the said main line or any portion thereof or of the property connected therewith or used thereon, then the faith of the Commonwealth of Pennsylvania is hereby pledged for the enactment of all laws and the performance of all acts necessary to carry out the true intent and meaning of this act.

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SECTION 14. That all necessary expenses incurred by the Governor under the provisions of this act shall be paid, out of any moneys in the treasury not otherwise appropriated, upon warrants drawn by him.

SECTION 15. That the purchaser of said works shall have a perpetual corporate succession; and if the said purchaser shall at any time misuse or abuse any of the privileges granted by this act the Legislature may revoke all and singular the rights and privileges granted to said company on a judicial decree of said misuse or abuse being first duly had and obtained, and thereupon may take for public use the road or roads, canal or canals, so purchased or constructed in pursuance of this act: Provided, That in resuming said franchises

no injury shall be done to the corporators of said company; and in taking such road or roads, canal or canals, for public use full compensation shall be made to the stockholders.

SECTION 16. That in the event of a sale and delivery of said main line as aforesaid all further payments on account of the appropriations for motive power or other expenses on said main line, as provided in an act to provide for the ordinary expenses of government, the repairs of public canals and railroads and other general and special appropriations for the year one thousand eight hundred and fifty-seven shall be suspended.

J. LAWRENCE GETZ,
Speaker of the House of Representatives.
DAVID TAGGART,
Speaker of the Senate.

Approved the sixteenth day of May, anno Domini one thousand eight hundred and fifty-seven.

JAS. POLLOCK.

Acceptance of Act of 1857.

At a special meeting of the stockholders of the Pennsylvania Railroad Company, held, after due notice by public advertisement, at Sansom-Street Hall, in the city of Philadelphia, at 3 o'clock p. m., on Monday, July 20, 1857, and by adjournment, at the office of the company, in said city, at 3 o'clock p. m., the Thursday next following, for the purpose of accepting or rejecting the provisions of the act of assembly hereinafter mentioned, and also for the purpose of considering such action as the directors of the said company had taken in pursuance of said act, but subject to the approval of the stockholders, his honor Richard Vaux, mayor of the said city, was called to the chair, and Edmund Smith, Esq., was appointed to act as secretary. The act of assembly having been read, the following resolution, offered by Solomon W. Roberts, Esq., was considered and duly adopted, to wit:

"Resolved, 1st, That the stockholders of the Pennsylvania Railroad Company accept the provisions of an act of the General Assembly of the Commonwealth of Pennsylvania entitled 'An act for the sale of the main line of the public works,' approved May 16, 1857, so far as the same in any way relate to or affect this company; and, 2d, they ratify and approve of such action as has been taken by the board of directors of the company in purchasing the said main line of the public works, pursuant to the provisions of said act of assembly, for the sum of (7,500,000) seven millions five hundred thousand dollars."

Certified from the minutes.

RICHARD VAUX, *Chairman.*
EDMUND SMITH, *Secretary.*

Deed-Poll of the Commonwealth of Pennsylvania to the Pennsylvania Railroad for the Main Line.

The Commonwealth of Pennsylvania, acting by the secretary of the Commonwealth, to all people to whom these presents shall come, sends greeting:

Whereas, by force and virtue of sundry acts of the General Assembly of the Commonwealth of Pennsylvania, from time to time duly passed and approved, and of divers mesne conveyances and assurances in the law duly had and executed, the said Commonwealth hath become seized and possessed of certain lines of canals and railroads hereinafter specified, made and constructed by the officers and agents of the said Commonwealth, in pursuance
336 of the said acts, between the cities of Philadelphia and Pittsburgh, in the State of Pennsylvania, and of certain real and personal estate thereto appurtenant, commonly called and known by the name of the main line of the public works of said State;

And whereas in and by a certain other act of the General Assembly of the said Commonwealth, entitled "An act for the sale of the main line of the public works," approved on the sixteenth day of May, anno Domini one thousand eight hundred and fifty-seven, it was enacted that the aforesaid main line of the public works should be exposed to public sale, and should be granted and conveyed, assigned and transferred, unto the purchaser thereof in the way, manner, and form and subject to the provisions, conditions, limitations, and restrictions therein particularly set forth and contained, as in and by the said last-recited act of assembly, a full certified copy whereof is hereunto annexed and marked with the letter A, will fully appear;

And whereas his excellency James Pollock, Governor of the said Commonwealth of Pennsylvania, in pursuance of the direction contained in the first section of the aforesaid act of assembly, did within the space of ten days after the approval of the said act cause to be inserted in one or more newspapers of extensive circulation, published in the cities of Philadelphia, Pittsburgh, Washington, Boston, New York, and in the borough of Harrisburg, a notice, a copy whereof is hereunto annexed, marked B, that the aforesaid main line of the public works would be exposed to public
337 sale at the Merchants' Exchange, in the city of Philadelphia and State of Pennsylvania aforesaid, at seven and a half o'clock p. m., on the twenty-fifth day of June, one thousand eight hundred and fifty-seven, that being within the period of forty days next after the passage of the said recited act, which notice appeared in each daily edition of the said respective papers until the said day of sale, as by reference thereto will appear;

And whereas on the aforesaid twenty-fifth day of June, one thousand eight hundred and fifty-seven, at seven and a half o'clock p. m., his excellency James Pollock, Governor aforesaid, did cause the said whole main line of the public works, with all the property thereto appertaining or in anywise connected therewith, to be ex-

posed to public sale, at the Merchants' Exchange, in the said city of Philadelphia, by the hands of Messrs. Myers & Claghorn, auctioneers, of said city, when and where the corporation known by the name, style, and title of The Pennsylvania Railroad Company, bought the same, subject to the several provisions, conditions, limitations, and restrictions set forth and imposed in the said recited act authorizing the sale thereof, for the price or sum of seven million five hundred thousand dollars, the said company, through their president, J. Edgar Thompson, Esquire, being the highest and best bidder, and that the highest and best price then and there bidden for the sale;

And whereas at a special meeting of the stockholders of the Pennsylvania Railroad Company aforesaid, held, after due
338 notice by public advertisement, at Sansom-Street Hall, in the said city of Philadelphia, at three o'clock p. m., on Monday, the twentieth day of July, one thousand eight hundred and fifty-seven, and by adjournment, at the office of the company, in the said city, at three o'clock p. m., on the Thursday next following, for the purpose of accepting or rejecting the provisions of the aforesaid act of assembly, and also for the purpose of considering such action as the directors of the said company had taken in pursuance of said act, but subject to the approval of the stockholders, it was, after due consideration, resolved and agreed by the stockholders then and there present that they do accept the provisions of the act of assembly authorizing the sale of the main line of the public works aforesaid, so far as the same in anywise relate to or affect said company, and that they do ratify and approve of such action as had been taken by the board of directors of the company in purchasing the said main line of public works, pursuant to the provisions of said act, for the aforesaid sum of seven million five hundred thousand dollars, as in and by the resolutions adopted at the said meeting, an attested copy whereof is hereto annexed, marked C, reference thereto being had, will appear;

And whereas the Pennsylvania Railroad Company aforesaid, in conformity with the terms and conditions of the said recited act of assembly, have caused to be duly executed, issued, and delivered unto the said Commonwealth of Pennsylvania the bonds of
339 the said company, bearing even date with these presents, and duly sealed with the cemmon or corporate seal of the said company, in the aggregate sum of seven millions five hundred thousand dollars, of which the proportion or sum of one hundred thousand dollars will become due and payable on the thirty-first day of July, one thousand eight hundred and fifty-eight; one hundred thousand dollars on the thirty-first day of July annually thereafter until the year one thousand eight hundred and eighty-nine, inclusive; one million dollars on the thirty-first day of July, one thousand eight hundred and ninety; one million dollars on the thirty-first day of July annually thereafter until the year one thousand eight hundred and ninety-three, inclusive, and the residue or sum of three hundred thousand dollars on the thirty-first day of July, one thousand eight hundred and ninety-four, with interest at the rate of five per centum per annum, to be paid on each of the

said bonds on the thirty-first day of the months of January and July in each year, and the first payment of interest to be made on the thirty-first day of January, one thousand eight hundred and fifty-eight, the receipt of all which bonds by the State treasurer is evidenced by his receipt therefor hereto annexed:

Now, therefore, know ye that the Commonwealth of Pennsylvania, acting herein by Andrew G. Curtin, the secretary of the Commonwealth, as well for and in consideration of the premises and of the aforesaid sum of seven million five hundred thousand dollars of the bonds of the Pennsylvania Railroad Company, issued
340 and delivered in manner and form as above recited, at and immediately before the execution and delivery of these presents, the receipt whereof by the State treasurer is testified as aforesaid, hath granted, bargained, and sold, aliened, enfeoffed, released, conveyed and confirmed, assigned, transferred, and set over, and by these presents (by force and virtue of the power and authority given and granted by the seventh section of the said recited act of assembly, approved on the sixteenth day of May, one thousand eight hundred and fifty-seven, entitled "An act for the sale of the main line of the public works," and in obedience to and full execution of the direction thereof) doth grant, bargain and sell, alien, enfeoff, release, convey and confirm, assign, transfer, and set over, unto the Pennsylvania Railroad Company aforesaid, their successors and assigns, the whole main line of the public works between the said cities of Philadelphia and Pittsburgh, in the State of Pennsylvania, consisting of the Philadelphia and Columbia railroad, the Allegheny Portage railroad, including the new road to avoid the inclined planes, with the necessary and convenient width for the proper use of said railroads, the Eastern Division of the Pennsylvania canal, from Columbia to the junction, the Juniata Division of the Pennsylvania canal, from the junction to the eastern terminus of the Allegheny Portage railroad, and the Western Division of the Pennsylvania canal, from the western terminus of the Allegheny Portage railroad to Pittsburgh, and including also the right, title, and interest of the Commonwealth in the bridge over the Susquehanna, at Duncan's Island, together with
341 the same interest in the surplus water power of said canals, with the right to purchase and hold such lands as may be necessary to make the same available; and all the reservoirs, machinery, locomotives, cars, trucks, stationary engines, workshops, tools, water stations, toll-houses, offices, stock and materials whatsoever and wheresoever thereunto belonging or held for the use of the same, and together with all the right, title, interest, claim, and demands of the Commonwealth of Pennsylvania to all property—real, personal, and mixed—belonging unto or used in connection with the same by the said Commonwealth, and together with all and singular other the buildings, improvements, powers, authorities, ways, means and remedies, estates and interests, rights, members, incidents, liberties, privileges, easements, franchises, emoluments, reversions, remainders, rents, issues, profits, hereditaments, and appurtenances of what name, nature, or kind soever thereto belonging

or in anywise appertaining, which by force and virtue of the said recited act of assembly and the provisions thereof were meant and intended and of right ought to be hereby assigned and transferred therewith:

To have and to hold, receive, take, and enjoy, all and singular the hereditaments and premises hereby granted and assigned, or mentioned as intended so to be, with the several rights, privileges, powers, and authorities granted and conferred upon the purchaser in and by the said recited act of assembly, and all other the appurtenances, unto the Pennsylvania Railroad Company aforesaid, their successors and assigns, to and for the only proper use, benefit, and behoof of the Pennsylvania Railroad Company aforesaid, their successors and assigns, forever—

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Under and subject, nevertheless, to the observance and performance of all contracts and arrangements heretofore lawfully made by act of assembly or otherwise for and in respect to the use of such works and to the carrying out of the same with all persons interested therein, in the same manner as the Commonwealth of Pennsylvania or its agents are now required to do by law; and subject, also, to all and singular other the regulations, provisions, conditions, limitations, and restrictions concerning said works, and the use, management, and disposition thereof as are contained in the above recited act of assembly in pursuance whereof this sale and conveyance is made, the same to all intents and purposes as if they were herein again fully set forth, mentioned, and expressed—

It being the true intent and meaning of these presents that the secretary of the Commonwealth, above named, doth hereby grant, assign, transfer, and assure unto the Pennsylvania Railroad Company aforesaid, their successors and assigns, all and singular the estate, right, title, and interest of the said Commonwealth of Pennsylvania of and in the whole main line of the public works of the State of Pennsylvania aforesaid and every part and portion thereof, and of and in all property—real, personal, and mixed—belonging to and used by the said Commonwealth in connection therewith, together with all the rights, remedies, incidents, and appurtenances of every name, nature, sort, kind, or description whatsoever thereunto in anywise appertaining, which by force and virtue of the said recited act of assembly, approved May 16th, 1857, entitled "An act for the sale of the main line of the public works," and the provisions of the seventh or any other section thereof, he, the secretary of the Commonwealth above named, is authorized and empowered to grant, assign, transfer, and assure unto the highest and best bidder at such sale.

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In testimony whereof the said Andrew G. Curtin, secretary of the Commonwealth of Pennsylvania, has set his hand and affixed the great seal of the said Commonwealth to these presents, at Harrisburg, in the State of Pennsylvania aforesaid, on this thirty-first day of July, anno Domini one thousand eight hundred and fifty-seven.

[Seal of the State of Pennsylvania.]

ANDREW G. CURTIN,
Secretary of the Commonwealth.

Received on the day of the date of the foregoing written deed-poll of the Pennsylvania Railroad Company aforenamed their bonds for the sum of seven million five hundred thousand dollars, bearing interest and payable on the days and times before specified, being the full consideration in the said deed-poll mentioned.

H. S. MAGRAW,
State Treasurer.

In the original deed there is here inserted, marked A, An act for the sale of the main line of the public works, approved May 16th, 1857, with the certificate of the secretary of the Commonwealth to the fact of its being a true copy.

344 B.

Public Sale of the Main Line of the Public Works of Pennsylvania.

EXECUTIVE CHAMBER, HARRISBURG, *May* 16, 1857.

Notice is hereby given that, by authority of an act of the General Assembly of Pennsylvania, approved May 16, 1857, entitled "An act for the sale of the main line of the public works," there will be exposed to public sale at the Merchants' Exchange, in the city of Philadelphia, on Thursday, the 25th day of June, 1857, at 7½ o'clock p. m., the whole main line of public works between Philadelphia and Pittsburgh, consisting of the Philadelphia and Columbia railroad, the Allegheny Portage railroad, including the new road to avoid the inclined planes, with the necessary and convenient width for the proper use of said railroads, the Eastern Division of the Pennsylvania canal, from Columbia to the Junction, the Juniata Division of the Pennsylvania canal, from the Junction to the eastern terminus of the Allegheny Portage railroad, and the Western Division of the Pennsylvania canal, from the western terminus of the Allegheny Portage railroad to Pittsburgh, and including also the right, title, and interest of the Commonwealth in the bridge over the Susquehanna at Duncan's Island, together with the same interest in the surplus water power of said canals, with the right to purchase and hold such lands as may be necessary to make the same available, and all the reservoirs, machinery, locomotives, cars, trucks, stationary engines, workshops, tools, water stations, toll-
345 houses, offices, stock, and materials whatsoever and wheresoever thereunto belonging or held for the use of the same, and together with all the right, title, interest, claim, and demands of the Commonwealth of Pennsylvania to all property—real, personal, and mixed—belonging to or used in connection with the same by the Commonwealth on the terms and conditions prescribed by the said act of assembly, copies of which may be obtained on application at or letter addressed to the office of the secretary of the Commonwealth, at Harrisburg, Pennsylvania.

JAMES POLLOCK,
Governor of Pennsylvania.

In the original deed there is inserted, marked C, the acceptance by the stockholders of the Pennsylvania Railroad Company of the act of 1857.

PENNSYLVANIA, *ss:*

JAS. POLLOCK.
{Seal of the State of Pennsylvania.}

In the name and by the authority of the Commonwealth of Pennsylvania, James Pollock, Governor of the said Commonwealth, sends greeting:

Whereas in accordance with the provisions of an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act for the sale of the main line of the public works," approved on the sixteenth day of May, anno Domini one thousand eight hundred and fifty-seven, a copy of which said act is hereinbefore
346 exhibited, I did, on the twenty-fifth day of June, now last past, at seven and a half o'clock p. m., cause to be exposed at public sale at the Merchants' Exchange, in the city of Philadelphia, after due advertisement made in accordance with the requirements of said act of assembly, the said main line of the public works, with its several appurtenances mentioned and described in said act of assembly, at which said sale the Pennsylvania Railroad Company, a corporation created by the laws of the Commonwealth, became the purchaser thereof for the sum of seven million five hundred thousand dollars;

And whereas the said company having made payment of said sum in accordance with the provisions of said act of assembly and otherwise complied with its requirements: therefore I have accepted of their bid, do approve of the aforegoing deed-poll of conveyance, and have authorized and directed the secretary of the Commonwealth to affix to the said deed-poll the great seal of the Commonwealth of Pennsylvania in attestation of the due and effectual execution thereof.

In testimony whereof I have set my hand and caused the great seal of the State to be affixed to these presents, at Harrisburg, this thirty-first day of July, in the year of our Lord one thousand eight hundred and fifty-seven, and of the Commonwealth the eighty-second.

By the Governor:

ANDREW G. CURTIN,
Secretary of the Commonwealth.

347 Plaintiff's counsel offer in evidence act of assembly of April 4th, 1868. (Purdon's Digest, page 1094, limitation of liability act.)

Mr. MacVeagh admits its acceptance by resolution of the board of directors of the Pennsylvania Railroad Company on the 11th of April, 1868.

(Offer objected to by defendants; objection overruled; exception for defendants.)

Act April 4, 1868. (P. L., 58.)

SECTION 1. That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee: Provided, That this section shall not apply to passengers.

SEC. 2. That in all actions now or hereinafter instituted against common carriers or corporations owning, operating, or using a railroad as a public highway whereon steam or other motive power is used to recover for loss and damage sustained and arising either from personal injuries or loss of life and for which by law such carrier or corporation could be held responsible, only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained,
348 not exceeding in the case of personal injury the sum of three thousand dollars, nor in case of loss of life the sum of five thousand dollars.

SEC. 4. That all acts or parts of acts inconsistent herewith be, and the same are hereby, repealed, and any provisions in the acts incorporating such common carriers or corporations inconsistent herewith shall be repealed upon the acceptance of the provisions of this act by such carriers or corporations, and upon the acceptance of the provisions hereof by any carrier or corporation the same shall become a part of its act of incorporation.

This act was duly accepted by the Pennsylvania Railroad Company on April 15th, 1868.

Plaintiff's counsel also offer in evidence ordinance of councils of the city of Philadelphia, 13th October, 1879, entitled "An ordinance to authorize the Pennsylvania railroad to occupy a portion of Filbert street for railroad purposes." (Page 58 of the plaintiff's paper book.)

(Objected to; objection overruled; exceptions for defendant.)

An Ordinance to Authorize the Pennsylvania Railroad Company to Occupy a Portion of Filbert Street for Railroad Purposes.

Whereas the Pennsylvania Railroad Company have, by and under authority granted by law, projected and are about constructing a branch line of railroad to extend from its main line, in West
349 Philadelphia, into the business portion of the city; and

Whereas in the construction of said branch line as projected it is necessary that a portion of Filbert street west of Shock street shall be partially occupied thereby, and that certain other streets shall be crossed by bridging the same; and

Whereas the said Pennsylvania Railroad Company have, at a large expenditure of money, obtained rights of way for said line

through private property, so that the necessity of interfering with the streets of Philadelphia is to a great extent obviated: Therefore,

SECTION 1. The select and common councils of the city of Philadelphia do ordain—

That the Pennsylvania Railroad Company be, and is hereby, authorized to occupy the end of Filbert street, at the river Schuylkill, with an abutment for a railroad bridge, to be erected over and across the said river, and to use the line of said Filbert street from said abutment eastwardly to Shock (two hundred and twenty feet eastward of Twenty-first street) with an iron trestle-work for supporting a branch line of railroad that shall connect the main line of the Pennsylvania Railroad Company in West Philadelphia with property owned by the said company in the vicinity of Market and Fifteenth streets: Provided, That the said abutment and iron trestle-work shall be constructed to the satisfaction and acceptance of the chief engineer and surveyor of the city of Philadelphia and shall not prevent the use of the said Filbert street as so occupied as a public highway and thoroughway to the river, and that the clear headway under such trestle-work shall not be less than thirteen feet.

SEC. 2. That the said Pennsylvania Railroad Company are hereby authorized to bridge each and every of the streets running north and south, lying between Merrick street on the east and River Schuylkill on the west, wherever the line of said railroad may cross the same between Filbert street on the north and Jones street on the south: Provided, The structure for crossing said streets shall not interfere with the use of the street as a public thoroughfare, and that there shall be a clear headway at middle of carriageway of at least thirteen feet, and that the said Pennsylvania Railroad Company shall construct stone or brick bridges across Twenty-first and Twenty-second streets, provided suitable arrangements can be made with the trustees of the city gas works for sufficient ground at Twenty-second street on the south side of Filbert street.

SEC. 3. That the said Pennsylvania Railroad Company shall agree to keep the said railroad and structures in good order and condition, and to save the city of Philadelphia harmless, so far as the said city may be liable therefor, from any responsibility or liability whatever that may grow out of the establishment of said railroad.

JOHN BARDSLEN,
President pro tem. of Common Council.

Attest:

ALEX. J. McCLEARY,
Assistant Clerk of Select Council.

GEO. A. SMITH,
President Select Council.

Approved this thirteenth day of October, anno Domini one thousand eight hundred and seventy-nine (A. D. 1879).

WM. S. STOKLEY,
Mayor of Philadelphia.

352 An act to authorize the counties, cities, towns, or townships of this State, respectively, to enter into contracts with railroad companies whose roads enter their limits whereby said companies may relocate, change, or elevate their railroads.

SECTION. 1. Be it enacted, &c., That the proper authorities of any county, city, town, or township of this State, respectively, be, and they are hereby, authorized and empowered to enter into contracts with any of the railroad companies whose roads enter their limits, respectively, whereby the said railroad companies may relocate, change, or elevate their railroads within said limits or either of them in such manner as in the judgment of such authorities, respectively, may be best adapted to secure the safety of lives and property and promote the interest of said county, city, town, or township; and for that purpose the said authorities shall have power to do all such acts as may be necessary and proper to effectually carry out such contracts; and any such contracts made by any railroad company or companies as aforesaid with said authorities or either of them are hereby fully ratified and confirmed: Provided, That nothing in this proviso contained shall affect any contract made or hereafter to be made with any railroad company from apportioning the expenses of altering and adjusting the grades of existing railroads and intersecting streets in any city or borough so as to dispense with grade crossings.

Approved the 9th day of June, A. D. 1874.

J. F. HARTRANFT.

Laws of Pennsylvania, 1874, p. 282.

353 Endorsed on cover: Sup. Court U. S. 1888, Oct'r term. No. 291. The Pennsylvania Railroad Co., pl'ff in error, *vs.* P. H. Miller, administrator of Geo. R. Duncan, dec'd. Stipulation and addition to record. [Stamped:] Office Supreme Court U. S. Filed Feb. 13, 1889. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES.

The Pennsylvania Railroad Company

vs.

P. H. Miller, Administrator of George R. Duncan, Deceased.

October Term, 1888.

No. 291.

STATEMENT OF THE CASE.

The action below was trespass on the case brought by George R. Duncan against the Pennsylvania Railroad Company for consequential damages to his property, caused by the building of an extension or branch of the railroad of the defendant, on Filbert Street, Philadelphia, in 1881. The plaintiff was an owner of property abutting on said street. None of his property was taken by the railroad company in the construction of the extension, but it was injured thereby. The plaintiff rested his right of action on a provision of the Constitution of Pennsylvania adopted by the people in 1873, which took effect January 1st, 1874, providing as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements."

Prior to the adoption of the constitution, consequential damages to property, caused by the exercise by a corporation of the right of taking private property for public use, were not

recognized by the fundamental law of the State, and were not recoverable unless specially imposed in particular cases by statute. A cause of action existed only when property was *taken*.

The defendant set up the defense that it was not subject to the Constitution of 1874, which imposed a liability for property injured although not taken, and invoked the provision of article I., section 10, of the Constitution of the United States forbidding any State to impair the obligation of contracts. The defendant contended in the first place that by its charter, approved April 13th, 1846, it was invested with the contract right to make the improvement in question without further liability than that of the payment of damages for property taken. It was shown in the second place that it obtained its right to build the extension by deed from the State, made July 31st, 1857, and executed by authority and according to the terms of an act of Assembly for the sale of the main line of the public works of the State, passed May 15th of that year, paying therefor the sum of $7,500,000. This purchased right, it was contended, was, by the terms of the executed contract, exercisable, subject only to the liabilities recognized by the law at the time of the grant of the charter, which did not include a liability for consequential damages. These positions were asserted in the form of points of law submitted for the ruling of the trial judge. The court ruled against the defendant on all the points, and the jury found for the plaintiff in $20,000.

The Supreme Court of the State affirmed the judgment of the lower court in an opinion printed in the Record, page 115.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Pennsylvania erred in deciding that, notwithstanding that the Pennsylvania Railroad Company was entitled by the terms of its charter, granted in 1846, to exercise thereafter the right of eminent domain at

the price of paying only for property actually taken, and was not required to pay for property injured but not taken yet the price of the exercise of such franchise could be and was increased by the provisions of the Constitution of Pennsylvania, adopted in 1874, so that thereafter the said company should pay not only for property taken, but also for property injured but not taken.

2. The Supreme Court of Pennsylvania erred in its construction of the act of the General Assembly of Pennsylvania, passed May 15th, 1857, for the sale of the main line of the public works, and the deed of the Commonwealth to the Pennsylvania Railroad Company of July 31st, 1857, in pursuance of the provisions of the said act, in that by its said construction it permits the State to impair the obligation of the contract entered into between the said State and the said company by the said deed of July 31st aforesaid, executed by the authority and according to the terms of the said act of Assembly passed May 15th, 1857.

3. The Supreme Court of Pennsylvania erred in holding that the acceptance by the Pennsylvania Railroad Company of the act of the General Assembly of Pennsylvania, passed April 4th, 1868, made it subject to the provisions of the act of May 3d, 1855, and the constitutional amendment of 1857, and, as a consequence, to the general legislative power of the General Assembly. The effect of the said decision of the said court is that it permits the State to impair the obligation of both the previous contracts entered into between the State and the said company, to wit: one by the grant of the charter of the company, approved April 13th, 1846, and the other by the deed of July 31st, 1857, executed by the authority and according to the terms of the act of May 15th, 1857.

4. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 2,

of Philadelphia County, for its refusal to affirm the second point submitted at the trial of the cause in the said court.

Second Point.—"The defendant, under its charter and supplements in evidence, had full and lawful authority to erect and operate the said Filbert Street extension or branch, and in doing so had the right to occupy Filbert Street longitudinally without incurring any liability by reason thereof to the plaintiff as the owner of property abutting on said street."

5. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 2, of Philadelphia County, for its refusal to affirm the third point of the defendant submitted at the trial of the cause in the said court.

Third Point.—"The defendant, as purchaser of the Main Line of the Public Works of this State, under the act of Assembly and deed in evidence, had full lawful authority to erect and operate the said Filbert Street Extension or Branch, and in doing so had the right to occupy Filbert Street longitudinally without incurring any liability by reason thereof to the plaintiff as owner of property abutting on said street."

6. The Supreme Court of Pennsylvania erred in not reversing the judgment of the Court of Common Pleas, No. 2, of Philadelphia County for its refusal to affirm the fifth point of the defendant submitted at the trial of the cause in the said court.

Fifth Point.—"Under all the evidence in this case the verdict must be for the defendant."

ARGUMENT.

The single question before this court is whether the State of Pennsylvania, in imposing, through its courts, upon the Pennsylvania Railroad Company the liability for consequen-

tial damages provided by the State Constitution of 1874, impaired the obligation of a previous contract with that company, and thereby violated the provisions of article I., section 10, of the Constitution of the United States.

The contract, it will be contended, is contained in the charter of the Pennsylvania Railroad Company and in the terms of an executed grant or sale of property and franchises by the State to the railroad company in 1857.

It is now too late in the century, and too long since the doctrines declared in Fletcher *vs.* Peck, and the Dartmouth College case were imbedded and fixed forever in the organic law of the land, for us to discuss anew the fundamental principles of right that sustain those great judgments of Chief Justice Marshall. That charters of private corporations and that all executed grants are contracts, the obligations of which no State upon any pretext may impair, has become axiomatic constitutional law.

Said this court in the ~~Birmingham~~ Binghampton Bridge, 3 Wall., 51, 73, "The constitutional right of one legislature to grant corporate privileges and franchises so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken.

"A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the Government. An attempt even to reaffirm it could only tend to lessen its force and obligation. It received its ablest exposition in the case of Dartmouth College *vs.* Woodward, which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine that the charters of private corpora-

tions are contracts protected from invasion by the Constitution of the United States. * * *

"The principle is supported by reason as well as authority. It was well remarked by the Chief Justice in the Dartmouth College case, 'that the objects for which a corporation is created are universally such as the Government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration, for the grant.' The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished by the aid of associated wealth. This will not be risked unless privileges are given and *securities furnished* in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on Government to provide for them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature therefore says to public-spirited citizens: 'If you will embark with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you privileges that will justify the expenditure of your money and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

And when, after the assumption of the liabilities and burdens incident to the organization of a corporation as such, with the State's pledge of the inviolability of the contract contained in the charter, the State herself sells to the corporation as a perfectly competent contracting person, for a valuable monetary consideration, franchises and other property independent of the grant of the charter, and receives payment therefor, there are added to the executory charter engagement the protections and immunities that belong to an executed contract *in pais*, the obligation of which, under the decisions that have followed in the line of Fletcher *vs.* Peck, no State may impair.

The application of the doctrines of these cases to the facts of the present case will constitute the present argument.

The first inquiry is obviously as to

THE JURISDICTION OF THE COURT TO DETERMINE THE QUESTIONS RAISED.

The principles upon which the court acts in assuming or declining jurisdiction in such cases have been very recently summarized by Mr. Justice Gray, in New Orleans Waterworks *vs.* Louisiana Sugar Company, 125 U. S., 18, 38: "When the State court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the State court holds that there was a contract conferring certain rights and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and if it is of opinion that it did not confer the rights affirmed by the State court, and therefore its obligation was not impaired by the subsequent law, may, on that ground, affirm the judgment. *So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because if it did the subsequent law cannot be upheld.*

It is now well settled that a provision in a State constitution may be a law impairing the obligation of a contract.

Fisk *vs.* Jefferson Police Jury, 116 U. S., 131, 135;
Pacific R. R. Co. *vs.* Maguire, 20 Wall., 36;
Davis *vs.* Gray, 16 Wall., 203, 232;
R. R. Co. *vs.* McClure, 10 Wall., 511, 515.

The Supreme Court of Pennsylvania practically held, in the present case, that the contract of the State with the railroad company, did not, by reason of the relation of the charter of the latter to the reserved power of the legislature to alter or amend charters, confer the right claimed, namely, exemption from the imposition of consequential damages by constitutional amendment. The jurisdiction of this court is therefore apparent.

And, once assuming jurisdiction in a case of this kind, it follows as a corollary, that the court is not concluded by the view of the questions involved, taken by the Supreme Court of the State. "It is the general rule, that the construction given by State courts to State laws and constitutions is binding and conclusive upon the Federal courts; but the rule does not extend to cases in which this court is called on to interpret the contracts of States, though they have been made in the form of laws or by functionaries of the State in pursuance of State laws. Fidelity to the Constitution of the United States makes it necessary, that in such a matter this court should not follow the construction of a State court with whose opinion it cannot concur, and it makes no difference in the obligation whether the contract is in the shape of a law or of a covenant by the State's agents."

Jefferson Branch Bank *vs.* Skelly, 1 Black, 436.

Said Mr. Justice Matthews, in the opinion of the court in Louisville and Nashville R. R. Co. *vs.* Palmes, 109 U. S., 244, 256: "The question we have to consider and decide is, whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract; and whether its obligation is impaired; and if the decision of the question requires a construction of State constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except when they have been so firmly established as to constitute a rule of property."

See also Bridge Proprietors *vs.* Hoboken Co., 1 Wall., 116, and other cases cited in N. O. Waterworks *vs.* La. Sugar Co., 125 U. S., 36, 37.

Two propositions on behalf of the present plaintiff in error were maintained before the Supreme Court of Pennsylvania.

First: That the Constitution of Pennsylvania, known as the Constitution of 1874, under which the trial court had held the railroad company liable for consequential damages, did not, when properly construed in the light of the principles of law applicable to the case, attempt to impose such liability upon corporations theretofore vested with chartered and purchased rights; and, Second: That if the constitution did in fact attempt this, it was within the prohibition of the Federal Constitution against a State impairing the obligations of contracts.

The court, as will appear from the opinion printed in the transcript of record, decided that the new constitution did actually operate upon corporations theretofore chartered whose charters were subject to legislative amendment, alteration, or repeal, and that although its charter and other rights acquired by purchase from the State constituted a contract, that contract failed to protect the defendant against the new liability, because of the power of the legislature to amend, alter, or repeal, subject to which, it was held, the corporation took and exercised its rights.

It would be an inadequate presentation of the case to confine the argument for the plaintiff in error addressed to this court, to a criticism of the very narrow position taken by the Supreme Court of Pennsylvania. The Supreme Court of the United States being governed in such cases as the present, as we have seen, by its own law, it is proper to examine the whole subject anew in the light of the principles of constitutional law established by the court, with a view of finding, if possible, a broad basis upon which the decision, when made, and that of cognate cases that will follow in its train, may properly, and for all time rest. It may, however, be observed, in passing, that the Supreme Court of Pennsylvania, while recognizing the sacredness of the contract obligation entered into by the State with the Pennsylvania Railroad Company when the charter of the company was originally granted and accepted; and while declaring or conceding that, without more, in view of the state of the law at the time, this charter would have protected this company from

the subsequent imposition upon it of liability for consequential damages to property; and, further, while finding in the very constitution which established such liability a specific withdrawal from then existing railroad and certain other corporations of the benefit of future legislation excepting upon the condition of the acceptance of certain of its provisions—words which, coupled with others in the constitution, very plainly indicated that that instrument was conceived and intended by the persons who drafted it to be without effect upon the rights and immunities of theretofore existing corporations: while taking these obviously correct positions, the Supreme Court of Pennsylvania establishes the liability contended for by the plaintiff upon grounds wholly inconsistent with them, and altogether unsatisfactory, it is conceived, upon any comprehensive view of the questions involved. First of all, and as controlling the whole case, it was assumed by the court, without attempting to sustain it by argument, that the *status* of the defendant company as the State's vendee for a valuable monetary consideration of the property, one of whose immunities arose in the case, was in no respect different from, or stronger than, that of a corporation possessing a charter bestowed upon it by the State in its legislative capacity. Coming to interpret the new constitution of the State, it was next held that, while generally speaking, according to the plain inference from its language when its sections were collated and compared, pre-existing corporations were exempt from its restraints, as well as without the scope of its benefits, unless they should formally accept it, yet *all* such corporations were not so exempt, because some charters were subject to alteration by the *legislature* without the consent of the corporation. And then, confusing terms, it was assumed that this alleged right of the General Assembly of the State could be and was in fact exercised in the case of the defendant by a constitutional convention of the State.

It is obvious that the result of such a summary determination of the case not only invites but compels a resort to the present tribunal, so that, upon a careful consideration of *all* the important questions involved, the true bearings of the law may be ascertained.

In an inquiry such as the present it is necessary, as has often been said by this court, to consider both the contract itself and the subsequent law which is alleged to impair its obligation. Obviously a State court may err either in interpreting the contract or in interpreting the subsequent law, or in both. The contention here is that the Supreme Court of Pennsylvania did in fact err both in construing the new constitution so as to have it apply to this railroad company, and also in construing the previous contract so as to deprive it of value by way of protection against the constitution as so interpreted.

Two of the main propositions of the plaintiff in error naturally suggest themselves by this division of the subject. Of course if either is successfully maintained the court below erred.

I. *The Constitution of 1874 of Pennsylvania did not attempt to impose a liability for consequential damages to property upon corporations previously chartered.*

II. *If it did attempt to impose such liability, in so far as the liability thereby sought to be imposed adds a new burden to the franchises exercised by the Pennsylvania Railroad Company in this case, the obligation of a contract is impaired by the State within the prohibition of article I., section 10 of the Federal Constitution.*

I. The Constitution of 1874 of Pennsylvania did not attempt to impose a liability for consequential damages to property upon corporations previously chartered.

The provision of the constitution whose construction is involved, is contained in section 8 of article XVI., which is as follows:—

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be

paid or secured before such taking, injury, or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals, made by viewers or otherwise; and the amount of such damages, in all cases of appeal, shall on the demand of either party be determined by a jury, according to the course of the common law." It is a familiar rule of construction of written constitutions, as of all written documents, that the whole instrument is to be considered in determining the meaning of any part. Words which, when taken in connection only with their immediate setting, might seem to have one meaning, are given a wholly different, and frequently their only true, meaning when considered in the light of their context. A symmetrical intrepretation of a constitution is always to be sought, if possible. An instrument like this, the product of a single organized convention, represents, it is presumed, the single, mature, well-digested thought of the convention. A constitution which is not an accretion of years, a patchwork of amendments, but a body of law made and fashioned by one hand, and given life, as it were, at one breath, is only properly construed in its parts when it is construed as a whole. It might well be that the letter of a certain section of the instrument read according to the rules of grammar alone would have one meaning, while the true meaning of the section, because the meaning representing the true thought of the whole and its parts, would be something different. In such a case, it will be agreed, the grammar ought to be permitted to halt, or even to stumble, before the thought should be made to fall.

As bearing on the questions involved, it may also be observed that the men who framed the Constitution of Pennsylvania were men who must be presumed to have known the law, and to have been sensible of the limitations imposed upon their action by the Federal Constitution. With the Dartmouth College case as one of the landmarks by which they could be guided, it is fair to suppose they knew they would imperil their work by ignoring the very plain inhibitions upon State action which that decision established, or at

least declared. We would naturally, therefore, seek in the instrument they framed for evidence of their attention to the distinctions of Federal law by which they were governed. And it is perhaps not too much to say that, discovering in their Constitution much specific recognition of the doctrine of the inviolability of contracts by States, we can find the harmony of the instrument preserved only by testing the language of every part by the specific limitations recognized, and conforming it, where possible, to such limitations.

The Schedule attached to the Constitution of 1874 provides:—

"*Section First.*—This Constitution shall take effect on the first day of January, in the year one thousand eight hundred and seventy-four, for all purposes not otherwise provided for therein.

"*Section Second.*—All laws in force in this Commonwealth at the time of the adoption of this Constitution not inconsistent therewith; *and all actions, rights, prosecutions, and contracts shall continue as if this Constitution had not been adopted.*"

With this plain expression in the Schedule of fidelity to the mandates of Federal law, in turning to the body of the instrument itself we expect to find distinct disclaimers of power on the part of the State, and of intention on the part of the convention to impair the obligation of specific contracts, by legislating concerning them.

Accordingly both in the very article containing the provisions establishing a liability for consequential damages, and in the succeeding article, we find direct expressions of an intent to confine the privileges and limitations therein established to charter interests thereafter vested unless corporations previously existing shall consent to surrender their rights then existing.

Article XVI. section 2, reads: "The General Assembly shall not remit the forfeiture of the charter of any corporation *now existing*, or alter or amend the same, or *pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution.*"

Article XVII. section 10, reads: "No *railroad*, canal, or other transportation company *in existence at the time of the adoption of this article, shall have the benefit of any future legislation* by general or special laws, *except on condition of complete acceptance of all the provisions of this article.* (See Appendix, pages 71 and 75.)

The thought of these sections lying on their surface, is that the constitution was not intended or conceived of itself to apply to then existing corporations. Such an application was deemed possible only with the consent of such corporations plainly expressed.

Between these two expressions of the same idea, establishing, as it were, the boundary line of constitutional intendment, comes the provision that municipal and other corporations and individuals invested with the privilege of eminent domain shall pay consequential damages. The convention surely ought not, by a narrow construction of this provision, be made to unsay what it has said in the preceding, and what it repeats in the succeeding, breath, namely, that the Constitution *of itself* should have no bearing on then existing corporations.

The argument for such a construction is merely that the word "invested" means *then* invested as well as *thereafter* invested, and that, upon the concession that municipal corporations then existing are within the scope of the section, other corporations then existing, by reason of the correlation of words, must likewise be included within it.

The answer to the first of these positions is apparent. The tense of the verb "invested" can be established only by supplying before it the ellipsis of the auxiliary "having been," "being," or "to be," which are respectively past, present, and future auxiliaries. It is just as reasonable, *per se*, to presume that the convention intended to use the word with the future auxiliary as with either of the others, or with all of them prefixed. Its intention cannot be gathered conclusively from the mere use of the word without an auxiliary. It is therefore necessary to resort to the context, where cognate provisions are found. Resorting to these, as we have done, we find a

symmetrical meaning is obtained only by giving the section the future signification that neighboring sections demand.

The argument based on the fact that existing municipal corporations are affected has force only when respect is had to the words of the section alone. But the argument falls when placed by the side of the plain thought of the whole article, which has to do primarily, as its title indicates, with private corporations, and which almost in terms disclaims the control over such corporations which the argument asserts.

Municipal corporations, as to which no question of contract rights with the State could arise, were deemed absolutely within the control of the State. The word "invested," as applied to the words "municipal corporations," is allowed to have a past signification, because there is no absolute reason why it should not have such a signification. There is, however, no absolute reason why it should not have a future signification. Coming to private corporations, however, it is sufficient reason for the present contention that no construction of words should be permitted which would contravene the expressed thought of the instrument taken as a whole, and would expose it to the very objections, on constitutional grounds, against which its framers, imbued with a righteous sense of their relations to Federal law, sought to guard.

It is respectfully insisted that the intention of the framers of the constitution should be respected, and that the words, "other corporations invested with the privilege of taking private property for public use," ought not to be made to include corporations with which the State had theretofore entered into a contract, conferring the right of eminent domain with a less, but well-defined, measure of responsibility for the exercise thereof than that established by the new Constitution.

The position here contended for is directly supported by a late ruling of the Supreme Court of Pennsylvania (Williamsport Passenger Railway Company's Appeal, 120 Penna. St., 1), decided since the decision of the present case. It will be seen from this case that it is now the careful and mature opinion of the Supreme of Pennsylvania that the constitution has no effect whatever upon charters of private corporations

not accepting its provisions. The court declares that the constitutional convention claimed for itself no power to revise or abrogate charters. Adopting the language of an earlier decision, it says: "The constitutional convention, on the other hand, has expressly set down (Article II of the Schedule) that all rights, actions, prosecutions, and contracts shall continue as if the constitution had not been adopted. *And by the second section of the sixteenth article, it is manifest that the convention did not intend to subject any private corporation to any provisions of the constitution which might in any degree change the charter thereof.*" If otherwise, why say, "The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation except upon the condition that such corporation shall *thereafter* hold its charter subject to the provisions of the constitution. This section is so comprehensive and clear that nothing is left for surmise or doubt. *Charters of private corporations are left exactly as the new constitution found them, and so they must remain until the companies holding them shall enter into a new contract with the State by accepting the benefit of some future legislation.*"

If, however, it be held, notwithstanding all that has been urged to the contrary, that a liability for consequential damages was sought to be imposed upon theretofore existing corporations, then—

II. *In so far as this liability attempted to be imposed adds a new burden to the franchises exercised by the Pennsylvania Railroad Company, in this case the obligation of a contract is impaired by the State within the prohibition of article I, section 10, of the Federal Constitution.*

The Pennsylvania Railroad Company was originally chartered by an act of the General Assembly of Pennsylvania, approved April 13th, 1846, which authorized the construction of a railroad from Harrisburg to Pittsburgh. Laws of Penna., 1846, page 312 (Supplemental Record, page 131).

By the seventeenth section of the charter it was provided as follows: That the said company shall not prevent any person or persons, being the owner or owners of land bordering on or adjacent to said railroad, from making lateral railroads and connecting the same with the railroad of the company for the purpose of transporting thereon their produce or other material, being the products of said land; the said connections being made at the expense of the person or persons wishing the same, and according to the directions and subject to the approval of the directors of said company, or their authorized agent, and it shall be lawful for the said company, in the manner and subject to the conditions and provisions hereinbefore provided in relation to the main line of their railroad by this act authorized to be made, to make such lateral railroads or branches leading from the main line of their said railroad to such convenient place or points, in either of the counties into or through which the said main line of their road may pass, as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of said company.

The road was promptly built in accordance with the authority of the charter.

In 1857 the State of Pennsylvania, which was the owner of a number of railroads and canals which it had built between Philadelphia and Pittsburgh, the system being known as the Main Line of the Public Works, sold them to the Pennsylvania Railroad Company for $7,500,000. An important portion of the property sold was the Philadelphia and Columbia Railroad, extending between Philadelphia and Columbia, near Harrisburg.

The title papers to this property include an act of Assembly for the sale of the main line of the public works, approved May 16th, 1857; the formal acceptance of the act by the stockholders of the company, and a deed-poll of the Commonwealth of Pennsylvania to the Pennsylvania Railroad Company for the main line. (See Supplemental Record, pages 135–148.)

Section 11 of the act for the sale of the main line provides,

"That should any company already incorporated by this Commonwealth become the purchaser of said main line, they shall preserve, hold, and use the same under the provisions of their act of incorporation, and any supplements thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act in addition thereto; and all provisions in said original act and any supplements inconsistent with the privileges herein granted shall be and the same are hereby repealed."

By the third section of this act the purchaser was specifically authorized to straighten and improve the said Philadelphia and Columbia Railroad, and *to extend the same to the Delaware River in the city of Philadelphia.*

The railroad structure known as the Filbert Street Extension, and along which the plaintiff's property lies, is a small branch or extension of the track of the Philadelphia and Columbia Railroad, of about a mile in length. It extends from West Philadelphia in almost a straight line across the Schuylkill River to Broad Street, Philadelphia. The right to build it, as above appears, was granted in the charter of the Pennsylvania Railroad Company as extended by the act of 1857, the charter giving very liberal branching powers to the company, and the act of 1857 specifically declaring that the provisions of its charter should be enjoyed in connection with the new property. The right to build the branch may also be independently rested upon the act of 1857 and the deed-poll accompanying it, whereby the Pennsylvania Railroad Company *purchased for a valuable consideration* as *vendee*, from the State of Pennsylvania as *vendor*, the extension of its own liberal branching power to the Philadelphia and Columbia Railroad, and also, in specific terms, the right to build the present branch as an extension to the Delaware River.

The contract exempting the railroad company from liability for consequential damages, it will therefore be contended, is both a *chartered* and a *purchased* right.

The distinction between these kinds of rights will be found to be important when we come to consider the effect of the

contemporary legislation of the State relating to repeal, alteration, or amendment of charters. For the present it will be necessary only to inquire whether, independent of any contemporary legislation as to the repeal, alteration, or amendment of charters by the State—

I.

A CONTRACT EXISTED EXEMPTING THIS FRANCHISE FROM THE NEW BURDEN OF LIABILITY FOR CONSEQUENTIAL DAMAGES.

The doctrine of the Dartmouth College case and the law leading from it up to the latest decisions, as has been seen, is that charters of private corporations are contracts between the legislature and the corporations, having for their consideration the liabilities and duties which the said corporators assume by accepting them; *and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself.*

Cooley's Constitutional Limitations, star page 279.

At the time of the incorporation of the Pennsylvania Railroad Company in 1846, and of its purchase of the main line of the public works in 1857, and up to 1874, as has been said, and as will not be disputed, there was no general liability in the law of Pennsylvania for consequential damages to property not taken. Certain corporations of Pennsylvania took their franchises burdened with this liability because it was specifically imposed in their charters. But with a charter silent on the subject there was no such liability, because the organic law of the State denied it.

The imposition of such a liability after a charter is accepted, and its specific and implied burdens assumed, it is respectfully submitted, alters, by enlarging, one of the essential elements of the contract, namely, the consideration, and thereby directly contravenes the constitutional inhibition.

A charter is a contract in two respects.

(1.) It is a contract of the State with the corporators that

the franchises conferred in furtherance of the purposes of the organization shall be exercisable without abridgment, modification, or repeal, except by the consent of the corporation; and (2) the collateral provisions inserted in a charter which are beneficial to the corporation, although not necessary to the accomplishment of its design, are also contracts of the State, the obligation of which it may not impair.

(1.) The Dartmouth College case established the first of these propositions. It was held in that case that the college was entitled by its charter to carry out the purposes of its organization, in the manner and subject only to the restrictions of the charter, and that a statute of New Hampshire, which made changes in the government of the college not contemplated at the time the charter was obtained, impaired the obligation of the contract.

Said the court in its opinion (page 638), speaking by Chief Justice Marshall: "From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or *transfers to the Government any new power over it.*"

And Mr. Justice Story: "In my judgment it is perfectly clear that any act of legislation which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or *which restrains or controls the legitimate exercise of them*, or transfers them to other persons without its assent, is a violation of the obligations of that charter. If the legislature means to claim such an authority it must be reserved in the grant." (Page 712.)

The case of Planters' Bank *vs.* Sharp, 6 How., 301, affirmed the proposition as applied to the charter of a bank. A bank had been chartered by the State of Mississippi. The act of incorporation provided that the bank should have power "to possess, receive, retain, and enjoy lands, * * * goods, chattels, and effects of what kind soever, and the same to grant, alien, or dispose of for the good of the bank, also to discount notes and bills of exchange and to make loans." By a subsequent statute all banks in the State were forbidden to transfer notes or other evidences of debt. The court held

the statute unconstitutional so far as it concerned the Planters' Bank.

The Pennsylvania Railroad Company, as has been seen, was authorized to build branches in any of the counties through which it passed, and by its purchase of the Philadelphia and Columbia Railroad it not only acquired this branching power applied by general words to the new property, but there was given, or rather sold, the specific grant of a right to extend to the Delaware River, which was the right exercised in building this Filbert Street extension.

This right was an essential right conferred as a part, and in furtherance of the purposes, of the organization. The chartering of the railroad company with specific branching powers, meant that the company obtained as the primal franchise of its existence, the right to build a railroad *and* branches. This grant was just as certainly within the immediate purpose of the organization, as that of the private directorship of the affairs of the college in the Dartmouth College case, or that of the right in the Planters' Bank to hold and transfer evidences of indebtedness.

There is, therefore, in our case an essential right specifically given. The State enters into a contract with the corporation whereby the latter acquires the right to build this branch in return for the obligations assumed at the time as recognized by the law. The State then amends its constitution and practically says the right granted shall not be exercised, or if it is exercised, its exercise shall be discouraged by the burden of new liabilities not theretofore recognized by the law. This is in direct violation of the constitutional provision. It is none the less a violation of the constitutional inhibition, if the value of the right is lessened, although the right may not directly be taken away. "*One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.*"

Planters' Bank *vs.* Sharp, 6 How., 327;
Von Hoffman *vs.* City of Quincy, 4 Wall., 535, 553.

When a new disability is attached to an old contract, and its value and usefulness restricted, it is impaired. Planters' Bank case.

In determining the scope and extent of the charter contract with the corporation, the principle must be kept in mind that the *laws in force at the time it was made enter into and form part of it*, measuring at once the right acquired and the burden assumed. This is clearly established by this court in McCracken *vs.* Hayward, 2 How., 608, 612. It is there ruled (page 612): "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; *these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other.* There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled meaning; when it becomes consummated, the law defines the duty and the right; compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; *hence any law, which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract*, though professing to act only on the remedy, *is directly obnoxious to the prohibition of the Constitution.*"

So in Bronson *vs.* Kinzie, 1 How., 311, 319, "When this contract was made no statute had been passed by the State changing the rule of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court, and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. *They were the laws of Illinois at the time; and therefore entered into the contract*, and formed a part of it, without any express stipulation to that effect in the deed." If this is the rule of interpretation of contracts, and it clearly

appears, as it does, that at the time the right to build this branch railroad was acquired from the State as a distinct valuable part of the company's franchise, the law of Pennsylvania recognized no such burdens or liability as that attempted to be established by the Constitution of 1874, it follows as the night the day that the obligation of the contract is impaired if the new burden is imposed upon the company.

(2.) The second class of charter contracts, as has been stated, are the *collateral* stipulations inserted in charters. These are agreements of the State with the corporation, whereby it is stipulated that the latter shall enjoy some incidental advantage in the exercise of its franchises. The best and most abundant illustrations of this class of contracts are the specific undertakings in charters of railroad, bridge, and other corporations that they shall enjoy exclusive rights within certain limits, or shall be exempt, partially or wholly, from taxation for certain periods, or altogether.

The Binghampton Bridge, 3 Wall., 51;

Jefferson Branch Bank *vs.* Skelly, 1 Black, 436;

are leading cases illustrative of such contracts. No *such* contracts are implied. The assertion of a right as against the State to these incidental advantages must be supported by express words, in terms granting the privilege claimed.

Providence Bank *vs.* Billings, 4 Pet., 514;

The Charles River Bridge *vs.* The Warren Bridge, 11 Pet., 420.

And the presumption is always against the grant of such incidental advantages.

See Vicksburg, Shrevesport and Pacific Railroad Company *vs.* Dennis, 116 U. S., 615, and cases there.

It is obvious, however, that the present case does not raise the question of the existence of a contract of this latter kind. The contract which, it is contended exists, is not for an incidental or collateral advantage in connection with the principal undertaking, but for the performance of the principal undertaking itself. It is not a case like that of Providence Bank *vs.* Billings, of whether or not this railroad company,

without specific words to that effect, can claim in connection with the exercise of its essential franchise, exemption from the share of the common burdens of taxation imposed from time to time by the legislature. Nor is it the case of the Charles River Bridge *vs.* The Warren Bridge, of a claim to the collateral advantage of an *exclusive* right to a franchise of the kind. The claim is rather, as in the Planters' Bank case, that the right to exercise the franchise *as procured*, cannot be taken away directly by altering the terms of the charter, or indirectly by imposing burdens *illegal*, and, therefore, not in the minds of the parties when it was granted by the State, and its obligations assumed by the corporation. It is sometimes loosely said, and it will, perhaps, be contended by the defendant in error here, that only express contracts of the State are within the purview of the inhibition against impairing the obligation of contracts. This statement is true only as to the collateral advantages claimed as incidental to the exercise of the principal franchise. *These* advantages are given only by express contract.

But it has never been decided that the scope of a contract to exercise a particular franchise is measured and tested only by the naked words of the instrument conferring them. On the contrary, when essential rights are under consideration, implied contracts of the State connected therewith, are the main objects of inquiry and enforcement.

In Fletcher *vs.* Peck, 6 Cranch, 87, it was early laid down that in every executed grant by a State to one party there is an *implied* contract not to grant the same thing to another. See Town of Pawlet *vs.* Clark, 9 Cranch, 292. In the Dartmouth College case it was established that the grant and acceptance of a charter *implies* that it shall not be altered or repealed. In the recent case of Fisk *vs.* Jefferson Police Jury, 116 U. S., 132, the court directly ruled that the prohibition of the constitution against State laws impairing the obligation of contracts applies to implied as well as to express contracts, Mr. Justice Miller saying in the opinion that the implied contracts entitled to the protection of the constitutional provisions constitute a much larger class than

the express contracts. The contract here insisted upon is the undertaking implied in the granting of the franchises exercised by the railroad company that it should be permitted to exercise them. The right to burden their exercise by a liability unknown to the law at the time of the grant would be tantamount to a right to recall the franchise itself.

"*The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it.* Any deviations from its terms, by postponing or accelerating the period of performance which it prescribes, *imposing conditions not expressed in the contract*, or dispensing with the performance of those which are, however minute, or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.

Green *vs.* Biddle, 8 Wheat., 1, at page 84.

If, however, there is any doubt that, upon general principles and upon authority of precedents of this court the charter of a railroad company not specifically imposing a liability for consequential damages is a contract exempting it from the subsequent imposition of such liability, there can be no doubt that such was the law of Pennsylvania at the time of the grant of its charter in 1846, and such has been the case continually since.

The following are the decisions of the Supreme Court of that State upon the subject.

The first case asserting the doctrine was, perhaps, Shrunk *vs.* Navigation Co., 14 Sergeant and Rawle, 71, decided in 1826. At page 81 the court says :—

"The act of Assembly under which the defendants erected the dam which prevented the fish from passing up as high as the land of the plaintiff has directed compensation to be made in certain cases, and whether the plaintiff can bring himself within either of these cases is, I think, the only question in this case. Let us examine this act, then, *on which everything depends*, after premising that there is no reason why the court should be inclined to depart from the common

meaning of words in order to introduce what is sometimes called a liberal construction in favor of one party or the other. The plaintiff may think it hard if his land should be deteriorated in value to the public without receiving compensation, and the defendants would *surely have cause to complain of hardship if, after engaging in an enterprise of immense importance and great hazard to themselves, they should, by a forced construction, be involved in damages to an unknown amount not contemplated when they accepted their charter.*"

The next case was Monongahela Navigation Co. *vs.* Coons, 6 Watts and Sergeant 101 (1843). In that case Chief Justice Gibson said, pages 113–115 :—

"The State is a sovereign who cannot be sued against her consent, and there are no other limitations to her power over private property than those that are placed upon it by the Constitution. * * * The delegation of a valid authority protects the agents of the State as amply as it protects the State herself. * * * It is only to a case of *taking* that the obligation extends, and when a corporation acts by virtue of a constitutional law *it is subject to no other responsibility for acts of consequential damages than is specially provided for. * * * But there is no provision for consequential damages in the statute by which the defendant had been incorporated. If, then, the statute is constitutional, as it undoubtedly is, there is an end of the question, for a valid law necessarily affords a defense for acts commanded or authorized by it.*"

The next case was Henry *vs.* The Pittsburgh and Allegheny Bridge Co., 8 Watts and Sergeant, 85 (1844), where the court said, page 86 :—

"*The principle of this case was settled in the case of Navigation Co.* vs. *Koons, in which it was held that neither the State, nor a person artificial or natural acting by its authority or under a law which the legislature is competent to make, is answerable for consequential damages occasioned by the construction of a highway further than happens to be specially provided.*"

The next case was Monongahela Navigation Co. *vs.* Coon,

6 Penna. St., 379 (1847), where the doctrine for which the plaintiff in error now contends was explicitly and clearly decided. A portion of the first section of the syllabus is: "*The legislature cannot by a subsequent law give a remedy for damages where there was no remedy under the charter.*" There had been a supplementary charter proffered to the company, and accepted by it, in which the power had been reserved to alter and amend the franchises of the corporation, and the legislature had subsequently passed a law allowing consequential damages. The opinion was delivered by Chief Justice Gibson, who said: "*If the constitutionality of the declaratory act depended on the provisions of the original act of incorporation, we would be bound to pronounce against it.*" A charter to execute a public work which can only be accomplished by the State or an agent acting by its authority is essentially a contract between the State and the agent, and the principle needed not the decision in the Dartmouth College case to establish it. The wonder is that it happened to be controverted. The State itself is answerable for private damage no further than it is expressly made so by the provisions of the Constitution, which forbids private property to be *taken* for public use without compensation made for it. *A grant of this eminent domain, so far as it is not specially restricted, passes the immunity from responsibility which pertained to it while it was in the hands of the State*, and a corporation invested with it being the *locum tenens* of the State *is liable to consequential damage to private property no further than it is declared to be so in the charter of its incorporation.* In other words the State is bound to defend its servant as far as it could defend itself, unless the terms of the contract restricted the claim to protection when it was made. * * * Now, it has already been determined that the case before us was not provided for in the original act of incorporation, and had it continued to stand on that foot *the power of the State would have been incompetent to burden a company with charges not originally imposed upon it.* But, in 1839, it accepted a grant of further powers and privileges in consideration of an express reservation by the legislature of a power

to alter, amend, or annul its charter. * * * "It is evident that by accepting additional privileges and powers on the terms prescribed in the grant of them, the company surrendered the inviolability of its contract to the discretion of the legislature."

The next case was Mifflin *vs.* R. R. Co., 16 Penna. St., 182 (1851). After considering the decisions which established the doctrine that a company invested with the right of eminent domain is not answerable for consequential damages further than is provided by its charter, the court says, page 195: *We are thus reduced to the single point whether such a provision is discoverable in any of the statutes which have been enacted in reference to the branch railway particularly under notice;*" and, finding that such obligation was clearly imposed by a statute giving authority for the construction of the branch, it was so adjudged.

The next case was that of the N. Y. & Erie Co. *vs.* Young 33 Penna. St., 175 (1859), where the court say, page 181:—

"The grantees of such a franchise have the same power that existed in the State, and may exercise it subject only to such restrictions as are *imposed in the grant*, and they are subject only to the same liability, unless otherwise declared. * * * The doctrine has been distinctly held, and is a settled law of the land, if anything can be settled, that *unless the act of incorporation* provides for it, consequential damages are not recoverable from a railroad or other improvement company in constructing or maintaining their works."

The next case was that of Watson *vs.* R. R. Co., 37 Penna. St., 469 (1860), where Strong, J., delivering the opinion of the court, said, page 479:—

"When a canal or railroad company is empowered to take land for public improvement, it is not responsible for indirect or consequential injuries, *unless the liability to pay for them is imposed as a part of the price of the franchise.* * * * *Resort must always be had to the charter to determine the extent of liability beyond that of making compensation for property actually taken.*"

The next case was Buckwalter *vs.* Bridge Co., 38 Penna. St., 281 (1861), where it was said, page 286:—

"It would be a difficult proposition to maintain that the legislature, on granting corporate franchises to the defendants, *could not* do so upon the terms that they should pay, and satisfy the plaintiff for any injury they might occasion to his ferry, because the damage might be in its nature consequential. That such damages may be claimed from and assessed against a company, *if their organic law require it*, has often been decided. * * * This is not upon the ground that the Constitution requires compensation to be made for such injuries, for it does not. It is only for *taking* property under the right of eminent domain that compensation is required to be made by the Constitution. *Here, the terms upon which the privilege was granted and accepted that compensation beyond this should be made became a contract, and the company ought to be willing to observe it; if not, the law will compel them to do so.*"

These are believed to be all the decisions of this court upon the question previous to the adoption of the Constitution of 1874.

The first case which followed the adoption of the New Constitution was that of Boom Co. *vs.* Sanderson, 81½ Penna. St., 402 (1876), where the judgment of the court below was affirmed, and its opinion appears at length in the report of the case. Among other things, the learned judge below said: "It is well-settled law in Pennsylvania that a corporation empowered to make a public improvement, such as this corporation, is not responsible for indirect or consequential damages, unless the liability to pay for them is imposed *as a part of the price of the franchise*. In many of the charters granted by the legislature this obligation to make compensation for consequential damages has been imposed, while in others it has been omitted. *We must therefore have recourse to the charter of the defendants to determine the extent of their liability under it.*"

Then followed other cases down to the decision of the present case.

Hayes *vs.* Commonwealth, 82 Penna. St., 518 (1876), where the passage referred to *supra* page 16 occurs in the opinion.

Ahl *vs.* Rhodes, 84 Penna. St., 319, 324 (1877):—

"Even if the adjustment which these parties made had been of a character to which the inhibition of the Constitution of 1873 would in its terms apply, still upon this branch of this controversy the ruling settled in Hayes *vs.* Commonwealth would be decisive. It was there distinctly held that charters of private corporations are left exactly as the new constitution found them, and so they must remain until companies holding them shall enter into a new contract with the State by accepting the benefit of some future legislation. The corporate powers and privileges of this bank were created and defined by the act of incorporation passed on the 11th April, 1862, and the general legislation then in force."

Lewis *vs.* Jeffries, 86 Penna. St., 340 (1878).

In Long's Appeal, 87 Penna. St., 114 (1878), the court, pointing out that the question in the case involved only *the change of a remedy for an existing right*, said, page 118: "It is, however, but a remedy, and it neither enlarges nor abridges the rights vested in either party. Such being the case, we cannot see why the law-making power may not only amend the present remedy, but even substitute a new one, *provided there* be no interference with the company's franchise or the *citizen's right.* * * * *If, indeed, it appeared that a franchise of the company had been invaded by the act of 1874, we would not hesitate to pronounce that act invalid*, but we cannot see that such is the fact. The right of eminent domain remains to it intact. The right to straighten and improve its road has not been impaired, *neither is it required to pay more for the property it may see fit to appropriate, than formerly.*"

In Penna. R. R. Co. *vs.* Langdon, 92 Penna. St., 21 (1879), the court speaking of the proposition twice theretofore decided by it, that charters of private corporations were left exactly as the new constitution found them, said: "*The judgment of the court is so well vindicated in the clear and well-considered opinion of our brother Gordon, that we may be well excused any further discussion of this question.*"

Lycoming Gas and Water Co. *vs.* Moyer, 99 Penna. St., 615, 619 (1882): "It is not open to debate, that prior to the

Constitution of 1874, neither the Commonwealth nor its *locum tenens* was liable for consequential damages resulting from the exercise of eminent domain. It is, however, just as well settled that the legislature, *in its grant of the right to the corporation* might so limit the exercise of that right, as to make it subject to the payment of such damages."

The same court in the current case recognized this *as* a contract right under the Dartmouth College case, but rendered its decision on another ground, presently to be examined.

It will be observed that the first four of these decisions were rendered before the year 1857, when the right to build the Filbert Street extension was acquired. It was *then* the law of the State, subject to which this property was obtained, that the charter was a contract exempting it from consequential damages subsequently attempted to be imposed.

AND THIS WAS A RULE OF PROPERTY OF THE STATE.

We may, therefore, claim as conclusive of the present immediate contention, that for all practical purposes the charter will be considered such a contract by this court. Where the decisions of a State court establish a rule of property, they will be followed by the Supreme Court of the United States, even though the independent judgment of this body might be different from that of the State court.

Said this court in Burgess *vs.* Seligman, 107 U. S., 20, 33, speaking by Mr. Justice Bradley: "Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. *This is especially true with regard to the law of real estate and the construction of State constitutions and statutes.* Such established rules are always regarded by the Federal courts themselves as authoritative declarations of what the law is."

See also Louisville & Nashville R. R. Co. *vs.* Palmes, 109 U. S., 244, 256;

Connecticut Mutual Life Ins. Co. *vs.* Cushman, 108 U. S., 51.

It must therefore be considered as proven that a charter of a railroad company, silent on the subject of consequential damages, granted at a time when the law of the State does not recognize a liability for such damages unless specially imposed, constitutes a contract exempting the corporation from such liability.

But there is another aspect of the case which would seem to clearly establish the contract for exemption, whatever view may be taken of the rights of the defendant company when considered only as chartered rights.

The Pennsylvania Railroad bought from the Commonwealth the Philadelphia and Columbia Railroad in 1857, and paid the considerable sum of $7,500,000. The State acted as vendor and the railroad company as vendee, in the transaction. The railroad company bought the right set forth in section 11 of the act for the sale of the main line of the public works, to hold and use the new railroad property and the rights appurtenant to it *under the provisions of its act of incorporation.* By the provisions of its act of incorporation, interpreted by the general law in force at the time, there was an immunity from liability for consequential damages. It is a logical conclusion, therefore, that the railroad company bought this immunity from consequential damages. The undertaking of the State, as recited in section 11, was specific, that the provisions of the act of incorporation and the supplements thereto, modified by the privileges, restrictions and conditions granted by the act for sale of the main line, should be the terms upon which the property should be held and used. *Expressio unius est exclusio alterius.* It is now sought to add to those terms by making the vendee liable for something neither provided by its act of incorporation, by any of the supplements thereto, or by the act of 1857. This is practically adding to the price of the franchise or property bought, for which franchise or property a full monetary consideration was paid at the time. As an executed contract, therefore, it is within the protection of Fletcher *vs.* Peck.

The significance in the present controversy of the under-

taking in section 11 of the act for the sale of the main line, that the Pennsylvania Railroad Company, in purchasing the Philadelphia and Columbia Railroad should hold and use the same under the provisions of its act of incorporation, is seen by attending to sections 11 and 12 of its charter, granted in 1846. By these sections the company is authorized to enter into and upon, and occupy land, making compensation therefor as fixed by agreement with the owner or as assessed by a jury. The provisions of its charter, therefore, show that compensation shall be made for land *taken*. There is not a word as to liability for injury to land *not taken*. At the time of the purchase, and for years before and after, there was never a pretense that the provisions of the charter or of any of its supplements declared such liability. If such a liability had ever been claimed, the railroad company would very promptly have referred the claimants to its charter. The provisions of its charter and supplements, it would have been successfully urged, measured its liability and invalidated the claim. Less certainly cannot be urged when the liability is sought to be fixed upon the exercise of a later right, bought with the express stipulation that it should be enjoyed under the provisions of the charter. Indeed, much more can be urged, for the possession of the right not only implied a *status* as to measure of liability, but the *purchase* of the right, with the stipulation accompanying it, when effected, was, upon every just principle, a contract that the *status* should continue. If the undertaking of the Commonwealth, in contracting with the railroad company, as in the eleventh section of the act of 1857, be held to mear. less than this, it may just as well be held to mean nothing at all, by way of protection to the latter contracting party.

The same conclusion is required by another view of the contract. As the deed-poll of 1857 shows, the Commonwealth sold to the Pennsylvania Railroad Company all its right, title, and interest in the Philadelphia and Columbia Railroad, "together with all its right, title, interest, claim, and demands to all property, real, personal, and mixed, belonging unto or used in connection with the same by the State. And

together with all and singular the buildings, improvements, powers, authorities, ways, means and remedies, estates and interests, rights, members, incidents, liberties, privileges, easements, franchises, emoluments, reversions, remainders, rents, issues, profits, hereditaments, and appurtenances of what name, nature, or kind soever thereto belonging or in any wise appertaining, which by force and virtue of the said act of Assembly (the act for the sale of the main line and branches) and the provisions thereof were meant and intended *and of right ought to be hereby assigned and transferred therewith.* (Supplemental Record, page 145.)

The State of Pennsylvania was not itself liable for consequential damages, and the grant of the property passed to the railroad company its exemption.

If it be said that there is in the deed and the act of Assembly of 1857 no specific grant of the State's exemption from liability, it is only necessary to refer to the undertaking of the State whereby, as quoted above, all the privileges of the State in connection with the property were sold that were mentioned, or were meant and intended, "*and of right ought to be hereby assigned and transferred.*" And the case of Monongahela Navigation Company *vs.* Coon, 6 Penna. St., 379, had already decided and made it a rule of property that the State's exemption *ought to have been thereby assigned.* Said Chief Justice Gibson in that case (page 382), speaking for the court: "The State itself is answerable for private damage no further than it is expressly made so by the provision of the Constitution which forbids private property to be taken for public use without compensation made for it. *A grant of this eminent domain, as far as it is not specially restricted, passes the immunity from responsibility which pertained to it while it was in the hands of the State; and a corporation invested with it, being the* locum tenens *of the State, is liable to consequential damages to private property no further than it is declared to be so in the act of its incorporation. In other words, the State is bound to defend its servant as far as it could defend itself, unless the terms of the contract restricted the claim to protection when it was made.*"

We have thus shown that both the charter of the Pennsylvania Railroad Company and the deed of sale of the main line to it in 1857, were contracts which, without more, would exempt the company from liability for consequential damage thereafter. This much, indeed, was conceded by the Supreme Court of Pennsylvania in its opinion. The whole subject, however, has been here considered *de novo*, because of the importance of the truth of the propositions contended for, in case it is shown that that court erred in the ground upon which it in fact rested its opinion.

The court, in fact, decided that the Pennsylvania Railroad Company, purchasing in 1857 the right to build this Filbert Street extension, took the right subject to the State's power of amendment, alteration, or repeal of charters, which was reserved by the act of May 3d, 1855, and the constitutional amendment of 1857, and under which it was held, the consequential damage clause in the Constitution of 1874 could be made to apply to the corporation defendant in exercising the franchise obtained by this purchase.

We will now address ourselves to this branch of the case. The contention is that—

II.

THE CONTRACT OF EXEMPTION EXISTS AND IS ENFORCEABLE, NOTWITHSTANDING THE ACT OF 1855 AND THE AMENDMENT OF 1857.

The act of May 3d, 1855, was as follows:—

"Every charter of incorporation granted or to be granted shall be deemed and taken to be subject to the power of the legislature, unless expressly waived therein, to alter, revoke, or annul the same, whenever, in their opinion, it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the corporators, and as fully as if the reservation of said power had been therein expressed."

Laws of Pennsylvania, 1885, page 423.

The constitutional amendment of 1857, was as follows:—

"The legislature shall have the power to alter, revoke, or

annul any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the corporators."

The Pennsylvania Railroad Company, it has been mentioned, was chartered in 1846, before this act and constitutional amendment. And long after they were passed the Supreme Court of Pennsylvania decided, in 1870, that, notwithstanding their provisions, the legislature of the State had no control whatever over the charter of this railroad company.

Commonwealth *vs.* Pennsylvania Canal Co., 66 Penna. St., 41, 52, 53.

Relying upon this view of the law as a rule of property, vast sums of money have been expended by the railroad company, and vast investments made in its securities since.

Both its executed and its potential franchises have been deemed of great, and, indeed, of exceptional, value, largely because of this immunity from legislative control.

If the Filbert Street extension had been built under the charter of the company there could be no pretense, as the Supreme Court of Pennsylvania concedes, that consequential damages could be recovered against it.

Is the case altered simply because this company has purchased from the State a piece of property, in which purchase, as one of the terms of sale, is specifically incorporated the right to hold the same under the terms of its charter?

On the contrary, it would seem to be very materially strengthened thereby, for even had the transaction of 1857 been the grant of a charter, and not the sale of a property, the immunity from this liability would have followed under Humphrey *vs.* Pegues, 16 Wall., 244, which asserts the doctrine that the grant to one company of all the powers, rights, and privileges of another passes the latter's immunity from legislative control.

The act of 1855 and the amendment of 1857 provide that

charters thereafter granted may be altered. Was the sale of the main line in 1857 a charter, or even the amendment of a charter?

It is only by a confusion of terms that it can be so held, and if it was not, there is no room for argument that either the act of 1855 or the amendment of 1857 applies to the case, in authorizing the impairment of the obligations of this contract. The charter of a corporation is a law, or a contract in the form of a law, conferring upon the corporators the right or franchise of acting in a corporate capacity. It is at best a donation or gift *ex gratia* on the part of the State—the obligations to perform the duties assigned in the grant constituting the sole consideration for it.

A *sale* of property by the State, as vendor, to a previously organized corporation, as vendee, is something entirely different. It is not a constitution of a corporate entity with certain powers, for the corporate entity is already constituted. It is not a concession or grant of powers by the State to an artificial creature coming into being, subject to general laws then in force as to such new creations, for the creation is already a living, contracting being, capable of making its own terms with the State, and of paying for them as any other purchaser of property. The essential vice of the decision of the Supreme Court of Pennsylvania in the present case, so far as this branch of the case is concerned, is in assuming that the sale of the main line in 1857 was the conferring of a charter.

"Whence, then," say the majority of the court in their opinion, "did the Pennsylvania Railroad Company derive its authority to build the branch from the western side of the Schuylkill to Fifteenth Street? * * * From the act of the 16th of May, 1857. This act, *inter alia*, reads as follows: 'That any company already incorporated by this Commonwealth becoming the purchaser of the said main line shall possess, hold, and use the same under the provisions of their act of incorporation and any supplement thereto, modified, however, so as to embrace all the privileges, restrictions, and conditions granted by this act in addition thereto.' This

gave to the Pennsylvania Railroad Company a *new charter*, containing all the privileges of that of 1846."

With all deference to the learned judges who used this language, it is submitted that the act of 1857 did nothing of the kind. The Pennsylvania Railroad Company neither accepted or intended to accept a new charter in 1857. It neither surrendered or intended to surrender any of the rights obtained under its original charter, as the obtaining of a new charter would have implied. The Supreme Court of Pennsylvania in fact practically said this in its decision in Commonwealth *vs.* Pennsylvania Canal Company, already referred to. That case (66 Penna. St., 45) decided that the main line of public works, with its accompanying franchises, was the absolute and unqualified property of the Commonwealth. "By its deed made in pursuance of the act of 1857, the Commonwealth *conveyed* all of its right therein to the Pennsylvania Railroad Company on the 31st of July of the same year. The act of Assembly authorizing this *conveyance* is most full and ample *only reserving the power in the State to revoke the grant for misuse or abuse of the privileges granted, after a judicial decree of such misuse or abuse first duly had and obtained.*"

The act of 1857, therefore, as is here clearly seen, was only an enabling act to authorize the State to sell its property and to indicate the terms under which the sale should be made. It neither was, nor did it assume to be, the grant of a charter, or the amendment of a charter previously granted. On the contrary, in very apt words, it disclaimed this by characterizing the Pennsylvania Railroad Company as a *purchaser* in 1857 *under its own act of incorporation* of 1846.

After the company has in good faith acted as such purchaser and paid $7,500,000 for what it bought, is it not a palpable wrong to hold that it did not *buy* property but received a new charter subject, as new charters might be, to the laws then in force as to new charters?

If the company acted as a vendee in the transaction, and, as the contract provided, maintained the rights and was subject only to the restrictions of its charter and those of the en-

abling act as incorporated in the deed-poll of July 31st, 1857, of what application is either the act of 1855 or the constitutional amendment of 1857, which relate only to *thereafter chartered corporations?*

The act of 1855 does attempt to put previously chartered corporations in the same category with subsequently chartered corporations. But obviously the act could not, without more, apply to corporations already having contracts free from legislative interference.

The act of 1855 and the amendment of 1857 certainly do not provide that the charters of all corporations *purchasing* property from the State shall be subject to alteration, amendment, or repeal. If they had so provided, it is safe to say this railroad company would never have put its money into the transaction, potential with disaster to it as it would have been, with the legislature's absolute control over its franchises.

The test of whether or not the Pennsylvania Railroad Company, in purchasing the main line of public works from the State in 1857, received a new charter is found in answering the question *whether or not it received the corporate rights, it thereafter exercised, from the act of 1857 and the deed accompanying it.* The answer to this can only be in the negative. Whatever rights it obtained were not those of incorporation but of purchase, and so the act and deed characterize them. If the Pennsylvania Railroad Company had gone out of existence in 1857 even constructively, by consolidation with the Philadelphia and Columbia Railroad Company, there might be some pretense that the consolidated company was a new corporation. This was the case in Railroad Company *vs.* Maine, 96 U. S., 499, where it was held that a consolidated company formed by the union of previously existing companies was a new organization and was not entitled to the immunity from general taxation possessed by its constituent companies. But even the consolidation of two companies does not always constitute a new company subject to the general laws then in force, it being always a question of legislative intent.

Central Railroad and Banking Company *vs.* Georgia, 92 U. S., 665.

The object of the reservation to the State of the right to amend, alter, or repeal charters is to insure to the government control over corporate franchises, rights, and privileges, not to interfere with contracts which the corporation created by it may make. Date the *completed act of incorporation*, as we must in this case, before the State reserved to itself the right to alter charters, and it follows that with no contract of incorporation, but only a commercial contract to deal with, after the reservation, the right of the State to amend, alter, or repeal cannot be asserted. It was said in Railroad Company *vs.* Maine, 96 U. S., 510–511, that the State by a provision of this kind retains the power to alter the act incorporating the company in all particulars *constituting the grant to it of corporate rights, privileges, and immunities.* * * * Rights and interests acquired by the company, *not constituting a part of the contract of incorporation, stand upon a different footing.*

See opinion of Mr. Justice Field in Sinking Fund Cases, 92 U. S., 700, 758, 759.

If the contract of sale made with this railroad company in 1857 was not a part of the contract of incorporation, it does not matter as to the obligation to respect it—and that without reference to the State's right to alter *charters*—that the other contracting party happened to be the Commonwealth itself.

"When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as that of an individual. *Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges with a power to make a law which can vary the effect.*"

Hamilton's Communication to Senate, January 20th, 1795; 3 Hamilton's Works, 518, 519.

"When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her

representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

Davis *vs.* Gray, 16 Wall., 203, 232.

"When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly."

Hall *vs.* Wisconsin, 103 U. S., 5, 11.

When, therefore, the State of Pennsylvania in 1857, as recited in its deed and in the act authorizing the execution of the deed, sold the right that this company, with a previous immunity from liability for consequential damages, should use the new property and the privileges appurtenant to it, under the provisions of its charter, it directly impairs the obligation of the contract to impose this liability, although, as stated, it might be entirely different if the transfer effected after the act of 1855 was in any fair sense an incorporating act.

In this aspect of the case, it does not help the argument for the defendant in error to rely upon the provisions of the act of 1855, that the State's right to "alter, revoke, or annul" could be asserted thereafter on all occasions as fully as if the reservation of said power had been expressed in the particular grant. Nor, what amounts to the same proposition, does it avail to rely upon the principle that all general laws in force at the time of the charter are to be considered as incorporated in it. The answer to all such arguments is that the act of 1855 in terms contemplated only the right of alteration of *charters*, and there was nothing resembling an act of incorporation or of chartering in the transaction of 1857. Even if given the full force asked for it, therefore, the act does not apply to this case.

But there is another equally conclusive argument against the application of the State's right to "alter" to this contract. The constitutional amendment of 1857 of course does not apply, for it was not adopted until October, 1857, while the contract with the railroad company became complete by the delivery of the deed-poll on the thirty-first day of the preceding July.

We have, therefore, only a legislative act reserving to the legislature the right to alter, revoke, or annul subsequent charters. But what one legislature has enacted in its legislative capacity alone, a subsequent legislature can annul or modify. The case of New Jersey *vs.* Yard, 95 U. S., 104, is instructive in this connection. It was there ruled that a general law of the State giving to the legislature the right to alter and amend charters was avoided *pro hac vice* when a subsequent legislature chose to make a grant of exemption from taxation not subject to alteration or repeal. Said the court, at page 111: "The case before us differs from those in which, by the Constitution of some of the States, this right to alter, amend, and repeal all laws containing corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by an act of the legislature, because the power itself is beyond legislative control. *The right asserted in this case to amend or repeal legislative grants to corporations being itself but the expression of the will or purpose of the legislature for one particular session or term of the State of New Jersey, cannot bind any succeeding legislature which may choose to make a grant or a contract not subject to be altered or repealed. * * * It follows that, unlike the constitutional provision in other States, it is in New Jersey a question in every case of a contract made by the legislature, whether that body intended that the right to change or repeal it should inhere in it, or whether, like other contracts, it was perfect, and not within the power of the legislature to impair its obligation.*"

We may, therefore, examine the deed to this company, and the act of May, 1857, upon whose authority it was executed, to see whether an intention is fairly discoverable therein that *this* contract shall not be subject to alteration, revocation, or annulment at the mere will of the legislature.

We turn first to the eleventh section of the act of 1857, which declares that the new purchase shall be held under the *provisions* of the charter of the Pennsylvania Railroad Company dating from 1846, which confessedly at the time was not

subject to alteration, revocation, or annulment. This is saying almost in specific words that the rights conferred with the new purchase could not be altered, revoked, or annulled. But there is much more than this to show the intention of the legislature in 1857. The fifteenth section of the act for the sale of the main line specifically provides conditions and terms on which the grant could be annulled, namely, *on misuse or abuse of the privileges granted, and upon judicial decree of such misuse or abuse.* The words are: "And if said purchaser shall at any time misuse or abuse any of the privileges granted by this act, the legislature may revoke all and singular the rights and privileges granted to said company, on a judicial decree of said misuse or abuse being first duly had and obtained, and thereupon may take for public use the road or roads, canal or canals, so purcoased or constructed in pursuance of this act: *Provided*, That in resuming said franchises no injury shall be done to the corporators of said company; and in taking such road or roads, canal or canals, for public use, full compensation shall be made to the stockholders." (Supplemental Record, page 141.)

This is practically saying that alteration, revocation, or annulment *shall be only for cause and after judicial decree*, and excluded the general law of 1855 from application. For it would be a hopeless inconsistency to declare a right of withdrawal of the grant either in whole or in part for cause and after decree, and also to maintain in active force a right to withdraw without cause and at the mere will of the legislature.

Still another difficulty in the way of the defendant in error emerges at this point. The act of 1855, even if of application, provides that *no injustice shall be done to the corporators.* Section 15 of the act for the sale of the main line says, *no injury shall be done to the corporators.* When $7,500,000 is paid for a property with the specific right sold with it to hold and enjoy it under a previous charter free from legislative control, which was at the time solemnly adjudged by the State Supreme Court to be a contract exempting its possessor from liability for consequential damages,

it is not easy to argue that no injustice or injury is done to the corporators of this company, who are the original subscribers *and their successors.* However it might be that no injustice would be done to the corporators if the rights asserted were a pure donation from the State, when they were purchased at such a considerable sum it would seem to go without the saying that the abstraction of any material privilege or immunity from the property, tending to reduce its value, is an injustice.

Recapitulating the argument at this point, the propositions proven are that there was a contract held by this railroad company, exempting it from liability for consequential damages both *before the act of 1855 and the amendment of 1857, and after and notwithstanding the act of 1855 and the amendment of 1857.*

III.

THE CONTRACT RIGHTS OF THE RAILROAD COMPANY WERE NOT LOST BY THE ACCEPTANCE OF SUBSEQUENT LEGISLATION.

The question that next occurs is whether the acceptance by the Pennsylvania Railroad Company of the benefits and the assuming of the burdens of legislation by the State subsequent to the act of 1855 and the amendment of 1857, subjects the chartered and purchased rights of the company to annulment, alteration, or repeal.

This cannot be, unless the specific acts accepted imposed, as the condition of their acceptance, that the chartered rights of the company should be subject to legislative interference.

A late text-writer practically so states the law, "A corporation whose charter is unconditional may yield to the State the power of repeal and alteration, by accepting powers or benefits under an act of the legislature *containing* a reservation of the power of repealing or altering the charter of any company which accepts its provisions." Morawetz on Corporations, section 1109. The Supreme Court of Pennsylvania, in the present case, held that the mere acceptance by

the railroad company of the act of 1868 made its charter subject to alteration by the legislature. The act of 1868 limited liability of railroad companies in case of death to $5000, and contained no stipulation, or words that could be tortured into a stipulation, that corporations accepting it should *ipso facto* yield all their vested rights and immunities to legislative control.

To hold that, without such a stipulation in the act, a charter becomes impliedly exposed to legislative attack, is but to make of the act of Assembly which pretends to convey a benefit upon express terms, a mere trap to catch the corporations accepting it. No court ought for a moment to tolerate such a construction of the law.

This court has declined to put corporate rights on so narrow a basis. It was ruled in New Jersey *vs.* Yard that the reservation in a charter to a private corporation of the right to repeal or amend it, does not, without more, extend to subsequent amendments to the charter. The principle was there in effect enunciated, that where benefits are conferred and burdens assumed under an act of Assembly, *nothing is presumed to be either granted on the one part or relinquished on the other.*

The case of Monongahela Navigation Co. *vs.* Coon, 6 Penna. St., 379, upon which the Supreme Court of Pennsylvania rested its decision, merely affirmed the proposition that where there is an *express* grant in consideration of an *express* relinquishment of corporate immunities, the legislature's control over the corporation was established. As before stated, there was nothing of the kind here. There was neither in the transaction of sale in 1857, in the act of 1868, nor in any other act bestowing a benefit upon or selling a right to this company, anything suggestive of a proposition that the corporation was required or expected to yield its chartered immunities to the State as the whole, or as part, of the consideration for the benefits conferred.

The Constitution of Pennsylvania of 1874 contains provisions that the benefits of future legislation should be enjoyed by corporations upon the express terms of acceptance of

the limitations of the Constitution. Article XVI., section 2; article XVII., section 10. This was but declaring, by a consensus of opinion embodied in an organic law, that a withdrawal of rights and immunities can only be properly done when done expressly and for a consideration known and recognized at the time.

It is urged, however, that the acceptance of subsequent legislation exposed this corporation to legislative control, because all acts are passed subject to the general and organic laws in force at the time, and the acceptance of the benefits of those acts is the acceptance of the general and organic law. The answer to this is simply the concession that, in so far, and to the extent that, benefits are afterwards granted by the legislature, those benefits are subject to withdrawal by the legislature if the organic law forbids a contract by the legislature not to withdraw them. This would be tantamount to saying that rights conferred by charter after the amendment of 1857 would be subject to the limitations of that amendment which reserved to the legislature the power to alter charters. This would apply to the benefits conferred by the act of 1868 and similar acts, assuming that the conferring of those benefits constitutes the granting of a charter within the intendment of the Constitution. But how can this constitutional amendment of 1857 affect or be used to interpret the right purchased in 1857, when the latter was obtained in July and the amendment not adopted until the succeeding October of that year? And if resort is had to the act of 1855, then in force, the answers considered at length on a preceding page again recur, that the transaction of 1857 was the purchase of a property and not the granting of a charter, and that, even if it was the granting of a charter, there is abundant evidence in the contract of the State with the corporation that it was intended that the railroad company should enjoy the new property with only the limitations of its original charter as modified by the deed and act of 1857, by none of which instruments was there a recognition of the legislature's rights to impair the value of the grant.

Conceding now, for argument's sake only, that the Pennsylvania Railroad, in purchasing the main line in 1857, and in accepting subsequent legislation of the State, made its chartered and purchased rights subject to the act of 1855, and the amendment of 1857, another and distinct branch of the argument presents itself.

IV.

THE RIGHTS OF THE RAILROAD COMPANY ARE NOT AFFECTED BY THE NEW CONSTITUTION, BECAUSE THE ADOPTION OF THE NEW CONSTITUTION WAS NOT A VALID EXERCISE OF THE LEGISLATURE'S RIGHT TO ALTER, REVOKE, OR ANNUL CHARTERS.

The words of the act of 1855 and the amendment of 1857 must be carefully noticed.

The act of 1855 provided that every charter should be "deemed and taken to be subject to the power of the *legislature* * * * to alter, revoke, or annul."

The constitutional amendment of 1857 declared that the *legislature* should have the power to alter, revoke, or annul.

Is a constitutional convention, or are the people who adopt a new constitution, the *legislature* within the purview of these provisions? Clearly not, unless the meaning of words is to go for nothing, and the received canons of interpretation of language are to be abandoned. And if neither the constitutional convention nor the people adopting it can be regarded as the legislature, obviously the mere adoption of a new constitution providing for consequential damages is ineffective to impose them upon this corporation.

Section 1 of Article I., of the Constitution of Pennsylvania, in force when the act of 1855 was passed and the amendment of 1857 adopted, was as follows: "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." This provision is adopted as the first section of article II. of the present Constitution of the State."

(The Constitution of 1790, as amended in 1838, with the

subsequent amendments adopted in 1850, 1857, and 1864, constituting the organic law of the State up to January 1st, 1874, is printed for convenience of reference in the appendix, page 76.)

The first Article is devoted to the *legislature.*

There are twenty-six sections in it, the first of which is quoted above, and the last is the amendment of 1857. All the sections between the first and the last are devoted to stating the qualifications of the members of each house, the mode of their election, the rules of their proceeding, the limitations upon their power, and the like. The phrase "the legislature" occurs six times in the article. By its very environment it can be no more extensive in its signification, and can mean nothing else, than the body called the "General Assembly," which is vested with the legislative power of the Commonwealth. The use of the phrase in some of the sections excludes the idea of a more general meaning given to it than the "General Assembly."

For example: "Section 13. Each house * * * shall have all other powers necessary for a *branch of the legislature* of a free State.

"Section 14. *The legislature* shall not have power to enact laws annulliug the contract of marriage, in any case where, by law, the courts of this Commonwealth are, or may hereafter be, empowered to decree a divorce."

This latter section is absurd if the phrase "the legislature" be held to include the people met together in a constitutional convention to change their organic law. For it is, of course, evident that they can in their sovereign capacity make any enactment they please annulling the contract of marriage, and it would therefore be meaningless to limit themselves by an instrument which they can readily change.

Article II. contains the phrase three times, each time palpably referring to the General Assembly. Section 2, alluding to the returns of the election for Governor, declares that they shall be opened and published "in the presence of the members of *both houses of the legislature* and * * * contested elections shall be determined by a committee to be selected from *both houses of the legislature.*"

In section 15 the Secretary of the Commonwealth is directed to keep a register of the acts and proceedings of the Governor, and when required, lay the same and all papers, minutes, and vouchers relative thereto, before *either branch of the legislature.*

The phrase is found in the succeeding articles as follows:—

Twice in article VI., sections 3 and 4;

Twice in article VII., sections 1 and 4;

Five times in article IX., sections 7, 11, 12, 22, and 24;

Twice in article X;

Four times in article XI., sections 4, 7, 8, and 9.

From an examination of all these uses of the words "the legislature" in the State Constitution, when the act of 1855 and the amendment of 1857 containing them were framed, it is very plain that their meaning must be limited to the General Assembly."

Nor can the meaning of the words, upon any principle of interpretation based on "general intent," be extended so as to include the people assembled in constitutional convention, or meeting at the polls, to change their organic law. In New Jersey *vs.* Yard, 95 U. S., at page 113, this court, considering the effect of a reservation of right to repeal or amend a charter, said: "*It is not easy to see why such a provision should be extended beyond the terms in which it is expressed;* and all the force which properly belongs to it is given when the exemption from the constitutional provision against impairing the obligation of contracts is extended as far as the language of the exemption justifies, *and it should be extended no further by implication.*" It was said in Commonwealth *vs.* Randall, 10 Phila., 451: "It is a settled rule of construction that in the absence of ambiguity no exposition shall be made which is opposed to the expressed words of the instrument. *A verbis legis non est recedendum.* A court of law will not take any interpretation contrary to the express letter of such an instrument, for nothing can so well explain the meaning of the makers as their own direct words, since *index animi sermo* and *maladicta expositio quæ corrumpit textum.*"

See Douglas *vs.* Chosen Freeholders, &c., 38 N. J. L., 214;
Woodbury *vs.* Berry, 18 Ohio St., 456.

Said the Supreme Court of New York in White *vs.* Syracuse and Utica Railroad Co., 14 Barb., 559, 562:—

"*I suppose that when the right to alter the charter is reserved to the legislature, the meaning is that it shall be exercised by the body of men who answer that description at the time that the alteration is to be made*, governed by the rules which shall at that time be prescribed by the fundamental law of the State."

"In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States."

Cooley Const. Limitations, star page 87.

If, therefore, the General Assembly of the State can only properly be deemed "the legislature" with power to affect this contract, it is very plain that nothing else than an act of the General Assembly can affect it. It is, of course, no answer to say "What the legislature can do the people in their sovereign capacity can do." For this is not the fact. The people, under our system of government, cannot make laws, or do anything that amounts to a legislative act. This is a representative government. The people have surrendered to their representatives the law-making power, and the latter alone can exercise it.

Said the Court of Appeals of New York in Barto *vs.* Himrod, 8 N. Y., 483, 489: "The exercise of this power by the people * * * is not expressly and in terms prohibited by the Constitution; but it is forbidden by necessary and unavoidable implication. The Senate and Assembly are the only bodies of men clothed with the power of general legislation. They possess the entire power with the exception here stated. The people reserved no part of it to themselves, excepting in regard to laws creating public debt; and can therefore exercise it in no other case."

Nor can the exercise of a legislative function directly by

the people be sustained as a legislative act by way of delegation from the legislature. For it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other body or authority.

Locke's Appeal, 72 Penna. St., 491, 494;
Brown *vs.* Fleishner, 4 Oreg., 132;
Lammont *vs.* Lidwell, 62 Mo., 188.

It is therefore held by many courts that the legislature have no power to submit a proposed law to the people, nor have the people power to bind each other by acting upon it.

Cooley Const. Limitations, star page 120.

Upon this principle the courts of some States declare unconstitutional local option laws.

The courts which sustain such laws do so only on the ground that the specific legislative act is complete as it leaves the hands of the legislature, the people in their collective capacity merely exercising the function of determining whether the circumstances exist for giving the law effect.

See Locke's Appeal, *supra.*

The provision for consequential damages contained in the Constitution of 1874 was at no time under consideration by the Legislature of Pennsylvania. That body did not pass it as a legislative act, nor have they ever adopted it since its incorporation into the Constititution. This latter must be done before it becomes an act of the legislature, and therefore before any alteration of the contract with the railroad company can be made.

The present argument, it need scarcely be said, does not assert any new limitations upon the sovereignty of the people. It is not claimed that their supremacy at the ballot-box, or their control over their representatives, is any less than it has always been known to be. The simple proposition is maintained, that if the right to alter this contract exists or ever existed, the act of 1855 and the constitutional amendment of 1857 declare that the legislature shall exercise the power, and that body has never done so or attempted to do so.

If it is suggested, by way of answer to this position, that the Legislature of Pennsylvania did in fact alter this contract

by passing a law to call a convention to alter it, the reply properly may be made that the legislative body at no time acted upon *this particular subject*. The only legislative act involved was the calling of a convention. The minds of the people's representatives assembled as a legislature were never even directed to anything bearing on such contracts.

If the mere calling of a constitutional convention by the legislature in response to the people's mandate, makes the work of the convention, when adopted by the people, "acts of the legislature," the word "legislature" loses its real significance in political science, and anything becomes an act of the legislature which springs from the brains of any authority recognized by that body, without the further consideration by the General Assembly as such. This is a *reductio ad absurdam*.

In all the cases that have been been decided by this court where the effect of clauses reserving *to the legislature* the right to alter, amend, or repeal charters or other contract rights, has been considered, there is a distinct recognition of the principle contended for, that a mere constitutional amendment or adoption of a new Constitution is not an act of the legislature, and is therefore ineffectual in and by itself.

In Tomlinson *vs.* Jessup, 15 Wall., 454, the court passed upon a provision of a statute of South Carolina, which made all charters thereafter granted or amended subject at all times to amendment, alteration, or repeal *by the legislature*.

The Northeastern Railroad Company was a corporation chartered after this act. It claimed exemption from taxation under an amendment to its charter obtained in 1855.

Subsequent to the amendment, in 1868, a new Constitution was adopted, declaring that all corporations should be subject to taxation. Acts of Assembly were then passed, taxing various forms of real and personal property, including that of railroad companies.

The court, in declaring the legality of the taxes assessed against the railroad company does not give any effect whatever to the general provisions as to taxation contained in the new constitution, but rests its decision wholly upon the acts

of Assembly which, under the right *in the legislature* to amend, alter, or repeal, were necessary to effect a change in the railroad's charter rights. Said the court, speaking by Mr. Justice Field, page 458: "The power reserved to the State by the law of 1841, authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time *in the discretion of the legislature*. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude *legislative* interference with their exercise if the public interest should at any time require such interference." And page 459: "Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the *legislature* may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under *legislative* control all rights, privileges, and immunities derived *by its charter* directly from the State."

In Spring Valley Water Works *vs.* Schottler, 110 U. S. 347, there was a constitutional amendment and legislation after the contract upon which the water company rested its claim. The water company claimed a right under its charter to fill vacancies in its board of commissioners. The Constitution and laws of the State were subsequently changed, taking away this right under a provision in the organic law of the State that all charters could be altered or repealed. The court ruled that the subsequent change in the Constitution, *and the legislation consequent upon it*, could legally effect the alteration complained of.

Some effect *was* given in this case to the provision in the subsequently adopted Constitution. This was because of the significant fact that the right to alter or repeal charters *was*

not limited as in our case, to the legislature. Article IV., section 31, of the Constitution of California, adopted in 1849, under which the alteration was made, was as follows: "Corporations may be formed under general laws, but shall not be created by special acts except for municipal purposes. All general laws and special acts pursuant to this section *may be altered from time to time, or repealed.*"

Had the phrase "by the legislature" followed these last words by way of limitation, the court must have excluded from operative force the provisions of any subsequently adopted Constitution, taken by themselves. It seems almost too plain for argument that with the general principle of construction in force, that all the words of an instrument must be considered to explain it, and that effect must be given to every word, a right to alter or amend given to the legislature is not so large or the same as the right generally given. This, the above argument and decisions, it is submitted, practically establish.

And if so, it is established as an essential proposition of this case that the adoption by the people of Pennsylvania of the Constitution of 1874, which provides for consequential damages, was of itself wholly inoperative to impose them upon this corporation. For by the terms of the act of 1855 and the constitutional amendment of 1857, only the legislature or General Assembly was capable of annulling, altering, or repealing charters. And even assuming, as has been done for argument's sake here, that the franchise exercised in this case could be surcharged under the right to annul, alter, or repeal charters, the legislature has never acted on the subject.

V.

THE RAILROAD COMPANY HAS NOT ACCEPTED OR MADE ITSELF OTHERWISE SUBJECT TO THE PROVISIONS OF THE CONSTITUTION OF 1874.

There remains to notice the position of the defendant in error that, although the contract existed as here contended, and although the adoption of the new constitution of itself

had no effect upon the rights of the company theretofore existing, yet, by reason of the attitude of the company to the new constitution it is subject to its limitations. Two positions were taken by the defendant in error before the Supreme Court of Pennsylvania, which were held by that tribunal to be untenable. *First*, that the plaintiff in error had accepted the provisions of the instrument; and, *secondly*, that it derived its authority to build this branch from legislation and an ordinance of the Councils of Philadelphia, passed after the adoption of the constitution, and is therefore constructively subject to its limitations.

The Constitution of 1874 contemplated the acceptance by corporations of the limitations of the Constitution before future benefits of a legislative character could be enjoyed under it. Article XVI., section 2.

It was contended by the defendant in the trial court, and that contention has nowhere been met, that this corporation never accepted the new constitution, and is therefore not subject to its limitations. It would have been very easy to have shown adversely that the company had accepted the constitution, had it so done, as such acceptances are made by resolution of the directors, a certified copy of which is filed and recorded in the office of the Auditor-General, a transcript of whose record is evidence for all purposes. Act 22d May, 1878; Purd. Dig., 351.

But it is urged that the defendant company built its road by authority of the act of Assembly of Pennsylvania of June 9th, 1874 (Supplemental Record, page 151), in connection with the ordinance of Councils of Philadelphia of October 13th, 1879.

The act of June 9th, 1874, authorized the city authorities to enter into contracts with railroad companies for the relocation, change, or elevation of their railroads, and the ordinance of 1879 signified the formal assent of the city of Philadelphia to the building of this extension.

The Supreme Court of Pennsylvania has, however, decided in this case that the authority of the company to build this extension rests upon the acts of Assembly prior to the

act of 1874 and the ordinance of 1879. This was upon the ruling of McAboy's Appeal, 107 Penna. St., 548. This decision, unappealed from, makes the case *res judicata* so far as the claim goes of the acceptance of subsequent legislation by this company and implied submission to the limitations of the new constitution. It is therefore made unnecessary to show, as could very well be done, that the act of June 9th, 1874, has no bearing whatever upon this case, as it relates only to the relocation, change, or elevation of railroad structures already built, whereas the present construction was an extension or branch of an old railroad. It is also made unnecessary to do more than show that the attitude of the corporation towards the ordinance of October 13th, 1879, was that of courteous acquiescence in its suggestions, without a recognition of any right whatever in the city to confer or withhold the franchise exercised.

The defendant, indeed, offered evidence at the trial, to show that its representatives appeared before the committee of the Councils of Philadelphia when the ordinance was under consideration, and disclaimed any recognition of authority in that body to grant or withhold the franchise. The right to build was distinctly claimed to exist by virtue of its charter of 1846 and the purchase of the main line in 1857. (Transcript of Record, page 114.)

What the company did by way of recognition of the ordinances of October 13th, 1879, was this:—

Having resolved to exercise the authority it possessed to build this portion of railroad as a branch or extension of its main line, it knew that it could not exercise the power arbitrarily, but that it was obliged to exercise it in such reasonable manner as would evince its disposition to consider, as far as possible, the public and private interests which might be involved. As it would be obliged to cross the Schuylkill River, it decided to submit its plans for the bridge over the same, to the Port Wardens—not because the Port Wardens could confer upon it any authority it did not already possess, or could prevent its exercising the authority it did possess, but because they were the official custodians of the naviga-

ble and riparian rights of the river, and if they approved of the plan submitted, it would be persuasive evidence that those plans were reasonable and proper. It felt obliged also to occupy a portion of Filbert Street, longitudinally, and to cross other public streets at a considerable elevation. In precisely the spirit in which it had submitted its plans for crossing the river to the Port Wardens, it submitted its plans for occupying Filbert Street and crossing the other streets, to the Councils of the city, as the proper custodians of its highways, not because it supposed the Councils could give it any authority it did not possess, or take away any it did possess, but because their approval of the plan and route of construction, if they approved them, would be persuasive evidence that the defendant was exercising its franchises in a reasonable and proper manner.

It is true that the plaintiff in error did not anticipate that because it claimed to exercise a franchise it possessed, it would be asserted that it claimed absolute and uncontrollable power to build elevated railroads, or to cover the streets of Philadelphia with any structures it pleased, or to disregard at pleasure private rights and the public welfare. It was aware, indeed, that the Supreme Court of Pennsylvania, in the City of Pittsburgh *vs.* The Pennsylvania Railroad Company, 48 Penna. St., 355, mentioned with approval the fact that the route proposed had at one time been approved by the councils of that city as the most advantageous and best suited to promote the convenience of the inhabitants and the interests of the company; and in the case of the Cleveland and Pittsburgh Railroad Company *vs.* Speer, 56 Penna. St., 325, the same court said that the road had been located and built, not only without objection, but with the actual consent of the borough authorities, and that therefore it was to be presumed that it was a judicious and proper location. The plaintiff in error accordingly desired to avail itself of the judgment of the municipal authorities upon those questions, but it desired and accepted nothing more. Its conduct, in that respect, is believed to have been wholly praiseworthy, and to furnish no ground whatever for misconstruction of its purpose or its action.

In this connection two things are to be remembered. One is that the plaintiff in error, as already stated, has always from the inception of this litigation distinctly disclaimed any authority whatever from the act of Assembly of June 9th, 1874, or the ordinance of Councils of October 13th, 1879, to construct the portion of the railroad in question. The other is that the ordinance of Councils, so far from pretending to be in exercise of the authority granted by the act of Assembly in question, distinctly states in its preamble that the defendant has, *by and under authority granted by law, projected, and is about constructing, a branch line of railroad to extend from its main line in West Philadelphia into the business portion of the city.* Yet it was gravely argued that the defendant had availed itself of the act of Assembly mentioned; that that act was the sole basis of the ordinance; and that the two together have worked, in some subtle and mysterious manner, an acceptance of the provisions of the Constitution of 1874 by the Pennsylvania Railroad Company. The reason for this extraordinary conclusion is supposed to be found in the constitutional provision that "The General Assembly shall not * * * pass any law for the benefit of such corporation except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution."

In other words, an explicit refusal to accept any authority or benefit supposed to be granted by an act of Assembly, and an explicit statement in an ordinance, that the lawful authority exists independent of the act and the ordinance, are argued as conferring the benefit of the act upon the company disclaiming and repudiating it, and as conclusive proof of the complete acceptance by it of all the provisions of the New Constitution.

It is very apparent that no court will or can inflict a "benefit" upon a corporation in this way. The Supreme Court of Pennsylvania declined to do so, very properly finding all the authority necessary to build this branch in the earlier granted powers of the company. This court, it is submitted, must be of the same opinion, if it is to pass upon the point at all, with no exception of record as to the position taken upon this subject by the Supreme Court of Pennsylvania.

The Pennsylvania Railroad Company must accordingly be held as not subject to the Constitution of 1874, so far as concerns its attitude to the Constitution and legislation subsequent thereto. And it has already been seen that prior to the building of this road, its franchises were not subject on other grounds to impairment by constitutional amendment. And if it enjoyed a contract right to build this branch, bought from the State and paid for, as it was, free from impairment in any essential particular, it is a demonstration which may not be eluded, that the burden of the present liability cannot be forced upon the company as an addition to the price of the franchise exercised.

VI.

THE IMMUNITY FROM LIABILITY FOR CONSEQUENTIAL DAMAGES, WAS NOT LOST BY DELAY IN THE EXERCISE OF THE RIGHT OF BUILDING OF THIS IMPROVEMENT.

It is perhaps necessary at this point to anticipate the objection that might be urged to the immunity from liability from consequential damages, because of the fact that the building of this extension did not become an executed work until after the new constitution had changed the law. If the railroad company is not subject to the Constitution of 1874, so far as its contracts are concerned, it is very clear that nothing of liability established by that act could be imposed upon the company.

But whether subject to this constitution or not, a right to build this branch under certain liabilities then existing, having been purchased from the State, that right can at any time be exercised, and is subject, when exercised to no greater fundamental restrictions than the contract called for.

"I know of no rule of law," says a learned judge, "which obliges a corporation to exercise all its rights and franchises at once, under the penalty of losing those which are not exercised immediately. Such a rule would be very unreasonable, for many powers are conferred upon corporate bodies with reference to a future exercise of them, when their in-

terests, their business, or the public convenience may require it. As examples of this, may be cited the cases of The Philadelphia, Wilmington & Baltimore Railroad Company *vs.* Williams, 54 Pa. St., 103, and Black *vs.* The Philadelphia & Reading Railroad Company, 58 Pa. St., 249. In the former case it was determined by the Supreme Court that the company, under a charter granted in 1831, might, more than thirty years afterwards, lawfully lay an additional track for a turn-out and siding, and that they were not restrained from doing so by a requirement in their charter that they should lay out and construct their road 'as soon as they conveniently could,' the court saying that this expression was not a limitation upon the power given, which compelled the company to exercise its whole authority in the very beginning. 'It would be an unreasonable construction of its charter,' said the court, 'to require provision to be made for all the unknown wants of the future. The increase in trade and business, and the changes taking place often require new and increased facilities.' In the other case it was held that the Philadelphia & Reading Railroad Company, under a charter granted in 1833, had the right in 1865 to construct a new track from their main stem to the river Delaware at Port Richmond. These cases sufficiently demonstrate that there is no rule of law in this State which requires a railroad corporation to exercise all the powers contained in its grant in the beginning, or which declares that those powers which are not then exercised are lost." *Thayer, President Judge of the Court of Common Pleas, No. 4, of Philadelphia County, in "People's Passenger Railway Co.* vs. *Baldwin, 14 Phila. Rep., 231–232.*

And if the right to build this Filbert Street extension existed in 1881, under the charter of the company of 1846 and the purchase from the State in 1857, it must exist with the same immunities that belonged to it and made it valuable when obtained. The main line was purchased in 1857, and the money paid for it. The contract was executed then, and the Pennsylvania Railroad Company came into possession of everything, whether of property or immunity, granted at the time. It would be equivalent to impairing a vested right to

add to the consideration paid, by the subsequent imposition of a burden such as this. "A right is vested when it becomes a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another."

Richardson *vs.* Akin, 89 Ill., 138.

"If the State or its municipalities delegate any of its sovereign powers to persons or corporations, and the person or corporation, in consideration thereof, engages in some enterprise which he could not or would not have otherwise done, then such grants of privileges, public and private, become contracts for a sufficient consideration, and cannot be impaired by any subsequent act of the State or its municipalities capriciously and without just cause."

City of Louisville *vs.* Wible, 84 Ky., 290.

The city of Los Angeles entered into an agreement with the predecessor in title of the Los Angeles City Water Company by which, for an annual rent reserved and other considerations, the right was granted to sell and distribute water for domestic purposes, and to receive the rents and profits for their own use. Afterwards the mayor and council of Los Angeles passed an ordinance to impose monthly rates of license upon all persons or corporations, not municipal, vending water for domestic purposes, and an action was brought against the Los Angeles Water Company to collect the rates imposed upon them. The action was not sustained, the Supreme Court of California saying, in affirming the judgment of the lower court, "The City of Los Angeles by its solemn contract, and for various considerations therein stated, gave to the party under whom the defendant claims, the privilege of introducing, distributing, and selling water to the inhabitants of that city, *on certain terms and conditions, which the defendant has complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted.*"

City of Los Angeles *vs.* Los Angeles City Water Co., 61 Cal., 65.

The Supreme Judicial Court of Massachusetts decided in Commonwealth *vs.* Proprietors of New Bedford Bridge, 2 Gray, 339, that the Legislature of Massachusetts could not by an act subsequent to the incorporation of a company, which corporate act authorized them to build a bridge with draws of a certain width, require them to have the draws of another width. The court said (page 348):—

"Upon familiar and well-settled principles, the act, when accepted by the defendants, was an executed contract between them and the government, by the terms of which, as contained in the charter, both parties are equally bound. The defendants cannot, without the consent of the legislature, escape or evade any of the duties or obligations imposed upon or assumed by them under the act, nor can the legislature, without the assent of the defendants, *in any way affect or impair the original terms of the charter, by annexing new conditions, or imposing additional duties, onerous in their nature, or inconsistent with a reasonable construction of the contract.*"

The defendant in error, in the trial court and in the Supreme Court of Pennsylvania, attempted to vindicate the application of the constitutional provision to the contract in this case by making it—

(1.) An exercise of the police power of the State;

(2.) An exercise of the sovereign power of legislation by the State; or

(3.) An exercise of the State's power of altering the remedy for the assertion of existing rights.

These positions may be noticed briefly.

The imposition of a liability for consequential damages is not a police measure, because it has nothing to do with the health, morals, comfort, or safety of the people as such. It is a measure that has to do wholly with private interests, namely, those of the particular corporation, and the particular individual whose property is claimed to be affected by its struct-

ure. It has nothing to do even with the health, morals, comfort, or safety of the particular property-owner claimed to be injured. And certainly the public health, public morals, public comfort, and public safety are unaffected by it. The application of the provision to a particular corporation merely takes from that corporation certain moneys and hands them to the neighboring property-owner, the corporation, in the meantime and thereafter, operating its railroad in the same way and with the same effect upon the public as if consequential damages were unknown to the law.

It is a specious argument at best that rests the validity of this constitutional enactment upon the State's sovereign power of making laws, which it cannot stipulate away by contract.

The answer to the argument is that of Alexander Hamilton, that when a State as a private party makes a contract, the subject-matter of the contract is excepted out of its power to legislate in such manner as to affect the value of the undertaking to the other contracting party.

Upon this principle, contracts of States relieving corporations from taxation are sustained by this court. When such contracts are clearly proven to exist, they are uniformly sustained against State legislation subsequently made tending to impair their value.

It is commonly said, and said with truth, that all persons, whether natural or artificial, are subject to general legislative control by the State. And it is not pretended for a moment that this corporation is free from such control. The legislature may at any time pass laws for the better regulation of the affairs of the corporation which affect the public, as by requiring it to build fences about its tracks, or to pay damages for the commission of acts of negligence. But such legislative acts are very different from the establishment by the State of a kind of liability which impairs the exercise of the essential franchise granted and the use of the property sold. The one species of legislation protects the public against damages, or imposes a liability for acts violative of

recognized rights. The other attempts to create a new right from the citizen's standpoint, or a new wrong from the standpoint of the corporation, and then to place in this category of wrong the very right of railroad extension which was sold by the State coupled with the vendor's immunities.

The fallacy of the argument that the constitutional provision merely provided a remedy for a pre-existing right is shown by the Supreme Court of Pennsylvania in its opinion. (Transcript of Record, page 119.) It is there shown that under the law of Pennsylvania, as interpreted by its Supreme Court through the entire period of the existence of this corporation, there was no right to consequential damages as against the State or as against the corporation which was its *locum tenens* by purchase. And this court has time and again asserted, as in Walker *vs.* Whitehead, 16 Wall., 314, 318, that the State may change the remedy, or provide one if the right be pre-existent, provided no substantial right secured by the contract is impaired. But whenever such a result is produced by a particular act, to that extent it is void. "*The States are no more permitted to impair the efficacy of a contract in this way than to attack it in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution.*"

A liability for consequential damages, if imposed upon this corporation, incumbers the exercise of its right to build this extension bought from the State and paid for with the distinct stipulation that the State's immunities, including freedom from such liability, should be enjoyed by the vendee. No such breach of contract can be supported under the guise of furnishing a remedy for a right where no such right previously existed.

It is urged by the defendant in error, that relieving this corporation from liability for consequential damages under the contract with it, would establish a *status* for such corporations different from that of individuals. It is asked if individuals are subject to such liability, why should not corporations be so subject ?

This argument overlooks the fact, that until the adoption of the Constitution of 1874, the law of Pennsylvania recognized a difference between the *status* of ordinary individuals and other individuals and corporations invested with the State's right of taking private property for public use. Upon the theory of the law then current, it was thought no hardship that a different rule should exist as to some individuals, and other individuals and a certain class of corporations, because the latter were in effect exercising the State's right of eminent domain, the possession of which, with its burdens and obligations, was coupled with certain immunities.

It is still the law of Pennsylvania, notwithstanding the Constitution of 1874, that the State itself, when exercising its sovereign right of eminent domain, is free from liability for consequential damages. It is only the agents of the State—municipal and other corporations and individuals invested with the State's right of eminent domain—that are within the eighth section of article XVI. of the Constitution. It is not intimated by this defendant in error that it is inherently unjust that different measures of damage should be applied to the individual and to the State. The question as to whether other natural or artificial persons than the State itself, in exercising the right of eminent domain at any period subsequent to the Constitution of 1874, are liable for consequential damages therefor, is purely one of fact and not of ethics. The provisions of the Constitution and of the charter, or other contract with the corporation or the individual claiming the immunity, are to be considered and compared, and if the claimant is exempted from liability it should be so declared. And it is obvious that a corporation is in no better position than an individual. The present contention is that by the terms of the purchase from the Commonwealth in 1857, the Pennsylvania Railroad Company secured the *status* of the Commonwealth as to the property rights then acquired. If an individual had made the purchase, instead of the Pennsylvania Railroad Company, he would be entitled, as is this company, to the protection of the contract then entered into.

The argument of the plaintiff in error as here presented may be summarized:—

The Constitution of Pennsylvania did not, when properly construed, attempt to impose a liability for consequential damages upon theretofore chartered corporations.

If it did, this liability cannot be imposed upon the Pennsylvania Railroad Company in building the Filbert Street extension, without impairing the obligation of a contract within the prohibition of section 10 of Article I. of the Federal Constitution.

A contract exempting the plaintiff in error from such liability has been shown to exist upon the principles of the law of contracts as declared by this court, and also, and more particularly for the purposes of this case, by the Supreme Court of Pennsylvania in an unbroken line of decisions from a period antedating the charter of this company to the time of the decision now under review.

This contract of exemption has become a rule of property in Pennsylvania, which this court will enforce independent of its own judgment as to the existence of the contract.

The ground upon which the Supreme Court of Pennsylvania rested its decision adverse to the plaintiff in error, that the railroad company, by purchasing the right of extension after the act of 1855, took it subject to the State's right of alteration of the contract, has been shown to be unsound, because:—

(1.) The power of the State to alter charters, declared by a law subject to which the railroad company was held to have bought, did not give the State the right to add to the consideration, and burden the enjoyment, of property obtained as this was, not as a charter, but as property bought from the State, with the stipulation that it should be enjoyed with only the liabilities of the original charter of 1846, and with the State's full immunity from liability.

(2.) The act of 1855 and the amendment of 1857 made the General Assembly of the State alone competent to alter the words of the grant, if it was at all alterable, and the constitutional convention and the people at large, without an act

of the legislature, are therefore powerless to impose this liability.

The acceptance of subsequent legislation by the plaintiff in error was incompetent to raise such liability, for the reasons that (1) the benefits conferred by such legislation were not tendered upon the condition of a relinquishment of any of the contract rights of the railroad company; and (2) the railroad company was, at the worst, subject only to the *legislature's* exercise of the right of amendment of its charter, and that body has never exercised its alleged rights in the premises.

This plaintiff in error is not subject to the Constitution of 1874 by reason of acts of its own subsequent thereto, independent of its relation to the act of 1855 and the amendment of 1857, because: (1) It did not derive its right exercised in this case by virtue of or subsequent to the Constitution of 1874; and (2) it has never, either actually or impliably, accepted the provisions of that instrument.

And the right to make this improvement subject only to the limited liability of the contract was not lost by nonuser, but existed and was in force when exercised in 1881. Resort to the principles of the police power of the State, of the general legislative power of the State, or of the power of the State to create new remedies for existing wrongs, cannot be had, because the terms of the contract are of first consideration, made so by the broad and sweeping declaration of the founders of the Government, that no State shall, under the guise of exercising its police power or any of its sovereign powers, or under any pretext whatever, impair the obligations of contracts.

It is submitted, therefore, with confidence, that the error into which the majority of the Supreme Court of Pennsylvania fell in permitting the obligation of this contract, which they conceded existed, to be impaired, will be promptly reversed. It is, of course, needless to urge in this presence, that when the contract has been once established, nothing short of very plain authority will be sufficient to overthrow it.

For it is still the law, as declared by this court in The

Binghampton Bridge, 3 Wall., 51, 74, that "*it is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not.*"

It is urged that the doctrine contended for would be productive of hardship upon many innocent holders of property adjoining the lines of public improvements, and to a small extent this is true. But, it was no more true in the year 1874 than it was in the year 1873, or had been in many preceding years, during which this hardship had been voluntarily endured by many citizens of Pennsylvania. And it is a far less hardship than that of living under a system of law where the rights of parties depend, not upon their contracts, but upon the view which the members of the legislature or of a convention of the State may from time to time see fit to take of what ought to be their respective obligations to each other. Nor will it serve any honest purpose to impute to persons who insist that the true welfare of every member of the community is bound up with the maintenance of the sacredness of contracts with pretending that any special sacredness attaches to contracts between a State and a corporation. On the contrary, everything possessed by every corporation in Pennsylvania may be taken at any time by the State for any public use it judges to be proper, just as the property of individuals may be taken. But, if taken, it must be paid for. It cannot be confiscated. If any corporation in this State is found to possess under the settled law of the land rights which are burdensome and oppressive, the legislature is always at liberty to resume such rights and to subject them to any better public use its judgment may approve, but it must pay for them when it takes them. It cannot confer benefits upon individual citizens at the expense of any corporation by the easy process of repudiating its own solemn contracts with such corporation. The people of Pennsylvania who enacted

the Constitution of 1838 were quite as competent to define the relations they proposed to sustain to the corporations thereafter created, as the people of Pennsylvania who enacted the Constitution of 1874 were competent to define the relations they proposed to sustain to the corporations thereafter created, and it was not within the power of the people of Pennsylvania of 1874 to repudiate the obligations which the State had contracted under the provisions of the Constitution of 1838, or to surcharge the exercise, or add to the price, of franchises granted under the provisions of that Constitution. When, therefore, in 1846, the State of Pennsylvania induced the expenditure of large sums of money by the Pennsylvania Railroad Company, and again, in 1857, induced the same company to pay large sums of money into the State treasury, upon the faith of the grant of the State's right of eminent domain charged with liability only for property taken, it became quite impossible for the State of Pennsylvania in 1874, either by constitutional or legislative enactment, to surcharge that franchise, which had been already bought and paid for, with liability for property not taken. It could redeem to itself the franchise thus sold, but it could only do so for the purpose of subjecting it to some other public use, and upon the payment of a fair consideration. It could declare the terms upon which any future grant would be held, and those terms would be a part of any such contract thereafter made, but it could not, in the slightest degree, add to the burdens of the other contracting party in any contract theretofore made. It will not do to attempt to treat this question as one wholly between the plaintiff in error and the defendant in error. It is really a question between the plaintiff in error and its grantor, the State of Pennsylvania. It is not pretended that if the plaintiff in error had, prior to January 1st, 1874, exhausted the right of eminent domain it had bought and paid for by building the extension or branch in question before that date, that the defendant in error would have any pretense of claim against it. Nobody doubts that it paid the State before that date for all the right of eminent domain it has since exercised, and it is not pretended that at the time

of such purchase and payment any period was fixed for the exercise of such right. The contention is that the moment after the State had received the purchase-money for its right of eminent domain, charged by the express terms of the then existing constitution with liability only for property taken, it might surcharge the right with liability for property not taken. It does not affect the question of the right of the State to make this change in its contract, that it directs the proceeds of such surcharge to be paid to a certain class of property-holders. The objects of the bounty of the surcharge can in nowise affect the right to make it. If the State can thus increase the price of its grant after execution of the contract, it can do it just as well for its own benefit as for the benefit of certain owners of property. It does not matter a particle to the plaintiff in error what becomes of the additional price exacted from it. If it is compelled to pay the sums assessed in favor of the owners of property not taken by it, whether these moneys go in one direction or another, is of no consequence to it. The plaintiff in error, July 31st, 1857, bought and paid for all the rights the State then possessed to build the extension or branch in question. The State then possessed the right to build it, paying only for property *taken*. Yet learned lawyers will gravely argue to this court that the same State may, in 1874, of its own mere motion, lawfully impose upon its grantee the additional price of paying for property *not taken*. To do this is to repudiate the solemn contract of the State. It is to retain all the purchase-money, and retake a portion of the consideration for which it was paid, and to trample under foot the explicit declaration of the Constitution of the United States. Such a proceeding, it is believed this court will not sanction by affirming this judgment.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Plaintiff in Error.

APPENDIX.

The following matter is printed for convenience of reference:—

Constitution of Pennsylvania of 1874.

ARTICLE XVI.

Of Private Corporations.

Section 1. All existing charters, or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this Constitution, shall thereafter have no validity.

Sec. 2. The General Assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter holds its charter subject to the provisions of this Constitution.

Sec. 3. The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; and the exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State.

Sec. 4. In all elections for directors or managers of a corporation, each member or shareholders may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer.

Sec. 5. No foreign corporation shall do any business in this State, without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served.

SEC. 6. No corporation shall engage in any business other than that expressly authorized in its charter; nor shall it take or hold any real estate, except such as may be necessary and proper for its legitimate business.

SEC. 7. No corporation shall issue stocks, or bonds, except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, first obtained, at a meeting to be held after sixty days' notice, given in pursuance of law.

SEC. 8. Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals, made by viewers or otherwise; and the amount of such damages, in all cases of appeal, shall, on the demand of either party, be determined by a jury, according to the course of the common law.

SEC. 9. Every banking law shall provide for the registry and countersigning, by an officer of the State, of all notes or bills designed for circulation; and that ample security to the full amount thereof, shall be deposited with the Auditor-General, and for the redemption of such notes or bills.

SEC. 10. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing, and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation.

SEC. 11. No corporate body to possess banking and discounting privileges, shall be created or organized, in pursuance of any law, without three months' previous public notice, at the place of the intended location, of the intention to apply for such privileges, in such manner as shall be prescribed by law; nor shall a charter for such privilege be granted for a longer period than twenty years.

SEC. 12. Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines; and the General Assembly shall, by general law, of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or holding or controlling interest in the stock or bonds of any other telegraph company, owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph.

SEC. 13. The term "corporations," as used in this article, shall be construed to include all joint companies or associations, having any of the powers or privileges of corporations not possessed by individuals or partnerships.

ARTICLE XVII.

Of Railroads and Canals.

SECTION 1. All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose, shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line, with railroads of other States. Every railroad company shall have the right, with its road, to intersect, connect with or cross any other railroad; and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination.

SEC. 2. Every railroad and canal corporation organized in this State shall maintain an office therein, where transfers of its stock shall be made, and where its books shall be kept for

inspection by any stockholder or creditor of such corporation, in which shall be recorded the amount of capital stock subscribed or paid in, and by whom, the names of the owners of its stock, and the amounts owned by them, respectively, the transfers of said stock, and the names and places of residence of its officers.

SEC. 3. All individuals, asssociations and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made, in charges for, or in facilities for, transportation of freight or passengers, within the State or coming from or going to any other State. Persons and property transported over any railroad, shall be delivered at any station, at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to any more distant station; but excursion and commutation tickets may be issued, at special rates.

SEC. 4. No railroad, canal or other corporation, or the lessees, purchasers or managers of any railroad or canal corporation, shall consolidate the stock, property or franchises of such corporation, with, or lease, or purchase the works or franchises of, or in any way control, any other railroad or canal corporation, owning, or having under its control, a parallel or competing line; nor shall any officer of such railroad or canal corporation act as an officer of any other railroad or canal corporation, owning or having the control of a parallel or competing line; and the question whether railroads or canals are parallel or competing lines, shall, when demanded by the party complainant, be decided by a jury, as in other civil issues.

SEC. 5. No incorporated company, doing the business of a common carrier, shall, directly or indirectly, prosecute or engage in mining or manufacturing articles, for transportation over its works; nor shall such company, directly or indirectly engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may

carry the products of its mines and manufactories on its railroad or canal, not exceeding fifty miles in length.

SEC. 6. No president, director, officer, agent or employé of any railroad or canal company, shall be interested, directly or indirectly, in the furnishing of material or supplies to such company, or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company.

SEC. 7. No discrimination in charges, or facilities for transportation, shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise; and no railroad or canal company, or any lessee, manager or employé thereof, shall make any preferences, in furnishing cars or motive power.

SEC. 8. No railroad, railway or other transportation company shall grant free passes, or passes at a discount, to any person, except officers or employés of the company.

SEC. 9. No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities.

SEC. 10. No railroad, canal or other transportation company, in existence at the time of the adoption of this article, shall have the benefit of any future legislation, by general or special laws, except on condition of complete acceptance of all the provisions of this article.

SEC. 11. The existing powers and duties of the Auditor-General, in regard to railroads, canals and other transportation companies, except as to their accounts, are hereby transferred to the Secretary of Internal Affairs, who shall have a general supervision over them, subject to such regulations and alterations as shall be provided by law; and, in addition to the annual reports now required to be made, said secretary may require special reports, at any time, upon any subject relating to the business of said companies, from any officer or officers thereof.

SEC. 12. The General Assembly shall enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA OF 1790 AS AMENDED IN 1838, WITH THE SUBSEQUENT AMENDMENTS ADOPTED IN 1850, 1857, AND 1864.

ARTICLE I.

Of the Legislature.

SECTION 1. The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.

SEC. 2. The representatives shall be chosen annually by the citizens on the second Tuesday of October.

SEC. 3. No person shall be a representative who shall have not attained the age of twenty-one years, and have been a citizen and inhabitant of the State three years next preceding his election, and the last year thereof, an inhabitant of the district in and for which he shall be chosen a representative, unless he shall have been absent on the public business of the United States or of this State.

SEC. 4. In the year 1864, and in every seventh year thereafter, representatives to the number of one hundred shall be apportioned and distributed equally, throughout the State, by districts, in proportion to the number of taxable inhabitants in the several parts thereof; except that any county containing at least three thousand five hundred taxables may be allowed a separate representation; but no more than three counties shall be joined, and no county shall be divided in the formation of a district. Any city containing a sufficient number of taxables to entitle it to at least two representatives, shall have a separate representation assigned it, and shall be divided into convenient districts of contiguous territory, of equal taxable population as near as may be, each of which districts shall elect one representative.

SEC. 5. The senators shall be chosen for three years, by the citizens, at the same time, in the same manner, and at the same places where they shall vote for representatives.

SEC. 6. The number of senators shall, at the several periods of making the enumeration before mentioned, be fixed by the

legislature, and apportioned among the districts formed as hereinafter directed, according to the number of taxable inhabitants in each; and shall never be less than one-fourth nor greater than one-third of the number of representatives.

SEC. 7. The senators shall be chosen in districts to be formed by the legislature; but no district shall be so formed as to entitle it to elect more than two senators, unless the number of taxable inhabitants in any city or county shall, at any time, be such as to entitle it to elect more than two, but no city or county shall be entitled to elect more than four senators; when a district shall be composed of two or more counties, they shall be adjoining, and no county shall be divided in forming a district. The city of Philadelphia shall be divided into single senatorial districts of contiguous territory, as nearly equal in taxable population as possible; but no ward shall be divided in the formation thereof.

SEC. 8. No person shall be a senator who shall have not attained the age of twenty-five years, and have been a citizen and inhabitant of the State four years next before his election, and the last year thereof an inhabitant of the district for which he shall be chosen, unless he shall have been absent on the public business of the United States or of this State; and no person elected as aforesaid shall hold said office after he shall have removed from such district.

SEC. 9. The senators who may be elected at the first general election after the adoption of the amendments to the Constitution, shall be divided by lot into three classes. The seats of the senators of the first class shall be vacated at the expiration of the first year; of the second class, at the expiration of the second year; and of the third class, at the expiration of the third year; so that, thereafter, one-third of the whole number of senators may be chosen every year. The senators elected before the amendments to the Constitution shall be adopted, shall hold their offices during the terms for which they shall respectively have been elected.

SEC. 10. The General Assembly shall meet on the first Tuesday of January, in every year, unless sooner convened by the Governor.

SEC. 11. Each house shall choose its speaker and other officers; and the senate shall also choose a speaker *pro tempore*, when the speaker shall exercise the office of Governor.

SEC. 12. Each house shall judge of the qualifications of its members. Contested elections shall be determined by a committee to be selected, formed and regulated in such manner as shall be directed by law. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized by law to compel the attendance of absent members, in such manner and under such penalties as may be provided.

SEC. 13. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member, but not a second time, for the same cause; and shall have all other powers necessary for a branch of the legislature of a free State.

SEC. 14. The legislature shall not have power to enact laws annulling the contract of marriage, in any case where, by law, the courts of this Commonwealth are, or may hereafter be, empowered to decree a divorce.

SEC. 15. Each house shall keep a journal of its proceedings, and publish them weekly, except such parts as may require secrecy; and the yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journals.

SEC. 16. The doors of each house, and of committees of the whole, shall be open, unless when the business shall be such as ought to be kept secret.

SEC. 17. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 18. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the Commonwealth. They shall in all cases, except treason, felony and breach or surety of the peace, be privileged from arrest, during their attendance at the session of their respective houses, and in going to and re-

turning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

SEC. 19. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this Commonwealth, which shall have been created, or the emoluments of which shall have been increased during such time; and no member of Congress, or other person, holding any office (except of attorney-at-law and in the militia) under the United States or this Commonwealth, shall be a member of either house, during his continuance in Congress, or in office.

SEC. 20. When vacancies happen in either house, the speaker shall issue writs of election to fill such vacancies.

SEC. 21. All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose amendments as in other bills.

SEC. 22. No money shall be drawn from the treasury but in consequence of appropriations made by law.

SEC. 23. Every bill which shall have passed both houses, shall be presented to the Governor; if he approve, he shall sign it; but if he shall not approve, he shall return it with his objections, to the house in which it shall have originated, who shall enter the objections at large upon their journals, and proceed to reconsider it. If, after such consideration, two-thirds of that house shall agree to pass the bill, it shall be sent, with the objections, to the other house, by which likewise it shall be reconsidered, and if approved by two-thirds of that house, it shall be a law; but in such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return; in which case, it shall be a law, unless sent back within three days after their next meeting.

SEC. 24. Every order, resolution or vote, to which the con-

currence of both houses may be necessary (except on a question of adjournment), shall be presented to the Governor, and before it shall take effect, be approved by him, or being disapproved, shall be repassed by two-thirds of both houses, according to the rules and limitations prescribed in case of a bill.

SEC. 25. No corporate body shall be hereafter created, renewed or extended, with banking or discounting privileges, without six months' previous public notice of the intended application for the same, in such manner as shall be prescribed by law; nor shall any charter for the purposes aforesaid, be granted for a longer period than twenty years; and every such charter shall contain a clause reserving to the legislature the power to alter, revoke or annul the same, whenever, in their opinion, it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation.

SEC. 26. The legislature shall have the power to alter, revoke or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the corporators.

ARTICLE II.

Of the Governor.

SECTION 1. The supreme executive power of this Commonwealth shall be vested in a Governor.

SEC. 2. The Governor shall be chosen on the second Tuesday of October, by the citizens of the Commonwealth, at the places where they shall respectively vote for representatives; the returns of every election for Governor shall be sealed up and transmitted to the seat of government, directed to the speaker of the senate, who shall open and publish them in the presence of the members of both houses of the legislature;

the person having the highest number of votes shall be Governor; but if two or more shall be equal and highest in votes, one of them shall be chosen Governor by the joint vote of the members of both houses. Contested elections shall be determined by a committee, to be selected from both houses of the legislature, and formed and regulated in such manner as shall be directed by law.

SEC. 3. The Governor shall hold his office during three years from the third Tuesday of January next ensuing his election, and shall not be capable of holding it longer than six, in any term of nine years.

SEC. 4. He shall be at least thirty years of age, and have been a citizen and an inhabitant of this State seven years next before his election, unless he shall have been absent on the public business of the United States or of this State.

SEC. 5. No member of Congress, or person holding any office under the United States or of this State, shall exercise the office of Governor.

SEC. 6. The Governor shall, at stated times, receive for his services a compensation which shall be neither increased nor diminished during the period for which he shall have been elected.

SEC. 7. He shall be commander-in-chief of the army and navy of this Commonwealth, and of the militia, except when they shall be called into actual service of the United States.

SEC. 8. He shall appoint a Secretary of the Commonwealth, during pleasure; (and he shall nominate, and by and with the advice and consent of the senate, appoint all judicial officers of the courts of record, unless otherwise provided for in this Constitution.) He shall have power to fill all vacancies that may happen in such judicial offices during the recess of the senate, by granting commissions, which shall expire at the end of their next sessions: *Provided*, That in acting on executive nominations, the senate shall sit with open doors; and in confirming or rejecting the nominations of the Governor, the vote shall be taken by yeas and nays.

SEC. 9. He shall have power to remit fines and forfeitures, and grant reprieves and pardons, except in cases of impeachment.

SEC. 10. He may require information in writing, from the officers of the executive department, upon any subject relating to the duties of their respective offices.

SEC. 11. He shall, from time to time, give to the General Assembly information of the state of the Commonwealth, and recommend to their consideration such measures as he shall judge expedient.

SEC. 12. He may, on extraordinary occasions, convene the General Assembly; and in case of disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not exceeding four months.

SEC. 13. He shall take care that the laws be faithfully executed.

SEC. 14. In case of the death or resignation of the Governor, or his removal from office, the speaker of the senate shall exercise the office of Governor, until another Governor shall be duly qualified; but in such case another Governor shall be chosen at the next annual election of representatives, unless such death, resignation or removal, shall occur within three calendar months immediately preceding next such annual election, in which case a Governor shall be chosen at the second succeeding annual election of representatives. And if the trial of a contested election shall continue longer than until the third Monday of January next ensuing the election of Governor, the Governor of the last year, or the speaker of the senate, who may be in the exercise of the executive authority, shall continue therein until the determination of such contested election, and until a Governor shall be duly qualified as aforesaid.

Of the Secretary of the Commonwealth.

SEC. 15. The Secretary of the Commonwealth shall keep a fair register of all the official acts and proceedings of the Governor, and shall, when required, lay the same and all papers, minutes and vouchers relative thereto, before either branch of the Legislature, and shall perform such other duties as shall be enjoined him by law.

ARTICLE III.

Of Elections.

SECTION 1. In elections by the citizens, every (white) freeman of the age of twenty-one years, having resided in this State one year, and in the election district where he offers to vote ten days immediately preceding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector; but a citizen of the United States who had previously been a qualified voter of this State and removed therefrom, and returned, and who shall have resided in the election district, and paid taxes as aforesaid, shall be entitled to vote, after residing in the State six months: *Provided*, That (white) freemen, citizens of the United States, between the ages of twenty-one and twenty-two years of age, and having resided in the State one year, and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes.

SEC. 2. All elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*.

SEC. 3. Electors shall, in all cases, except treason, felony, and breach or surety of the peace, be privileged from arrest, during their attendance on elections, and in going to and returning from them.

SEC. 4. Whenever any of the qualified electors of this Commonwealth shall be in any actual military service, under a requisition from the President of the United States, or by the authority of this Commonwealth, such electors may exercise the right of suffrage, in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.

ARTICLE IV.

Of Impeachment.

SECTION 1. The House of Representatives shall have the sole power of impeaching.

SEC. 2. All impeachments shall be tried by the Senate. When sitting for that purpose, the senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present.

SEC. 3. The Governor and all other civil officers under this Commonwealth, shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall not extend further than to removal from office, and disqualification to hold any office of honor, trust, or profit, under this Commonwealth; the party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment, and punishment, according to law.

ARTICLE V.

Of the Judiciary.

SECTION 1. The judicial power of this Commonwealth shall be vested in a Supreme Court, in Courts of Oyer and Terminer and General Jail Delivery, in a Court of Common Pleas, Orphans' Court, Register's Court, and a Court of Quarter Sessions of the Peace for each county, in justice of the peace, and in such other courts as the legislature may from time to time establish.

SEC. 2. The judges of the Supreme Court, of the several Courts of Common Pleas, and of such other courts of record as are or shall be established by law, shall be elected by the qualified electors of the Commonwealth in the manner following, to wit: The judges of the Supreme Court by the qualified electors of the Commonwealth at large, the president judges of the several Courts of Common Pleas and of such other courts of record as are or shall be established by law, and all other judges required to be learned in the law, by the qualified electors of the respective districts over which they are to preside or act as judges: and the associate judges of the Courts of Common Pleas, by the qualified electors of the counties respectively. The judges of the Supreme Court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well (subject to the allot-

ment hereinafter provided for, subsequent to the first election). The president judges of the several Courts of Common Pleas, and of such other courts of record as are or shall be established by law, and all other judges required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well. The associate judges of the Courts of Common Pleas shall hold their offices for the term of five years, if they shall so long behave themselves well: all of whom shall be commissioned by the Governor, but for any reasonable cause which shall not be sufficient grounds of impeachment, the Governor shall remove any of them on the address of two-thirds of each branch of the legislature. The first election shall take place at the general election of this Commonwealth next after the adoption of this amendment, and the commissions of all the judges who may be then in office shall expire on the first Monday of December following, when the terms of the new judges shall commence. The persons who shall then be elected judges of the Supreme Court shall hold their offices as follows: one of them for three years, one for six years, one for nine years, one for twelve years, and one for fifteen years; the term of each to be decided by lot by said judges as soon after the election as convenient, and the result certified by them to the Governor, that the commissions may be issued in accordance thereto. The judge whose commission will first expire shall be chief justice during his term, and thereafter each judge whose commission shall first expire shall in turn be the chief justice, and if two or more commissions shall expire on the same day, the judges holding them shall decide by lot which shall be the chief justice. Any vacancies happening by death, resignation or otherwise, in any of the said courts, shall be filled by appointment by the Governor, to continue till the first Monday of December succeeding the next general election. The judges of the Supreme Court and the presidents of the several Courts of Common Pleas shall, at stated times, receive for their service an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office, but they shall receive no fees or perquisites of office, nor hold any

other office of profit under this Commonwealth, or under the Government of the United States, or any other State of this Union. The judges of the Supreme Court, during their continuance in office, shall reside within this Commonwealth, and the other judges, during their continuance in office, shall reside within the district or county for which they were respectively elected.

SEC. 3. Until otherwise directed by law, the Courts of Common Pleas shall continue as at present established. Not more than five counties shall at any time be included in one judicial district organized for said courts.

SEC. 4. The jurisdiction of the Supreme Court shall extend over the State; and the judges thereof shall, by virtue of their offices, be justices of Oyer and Terminer and General Jail Delivery in the said several counties.

SEC. 5. The judges of the Court of Common Pleas in each county shall, by virtue of their offices, be justices of Oyer and Terminer and General Jail Delivery, for the trial of capital and other offenders therein; any two of the said judges, the president being one, shall be a quorum; but they shall not hold a Court of Oyer and Terminer or Jail Delivery in any county when the judges of the Supreme Court, or any of them, shall be sitting in the same county. The party accused as well as the Commonwealth may, under such regulations as shall be prescribed by law, remove the indictment and proceedings, or a transcript thereof, into the Supreme Court.

SEC. 6. The Supreme Court and the several Courts of Common Pleas shall, beside the powers heretofore usually exercised by them, have the power of a court of chancery, so far as relates to the perpetuating of testimony, the obtaining of evidence from places not within the State, and the care of the persons and estates of those who are *non compos mentis;* and the legislature shall vest in the said courts such other powers to grant relief in equity, as shall be found necessary, and may, from time to time, enlarge or diminish those powers, or vest them in such other courts as they shall judge proper, for the due administration of justice.

SEC. 7. The judges of the Court of Common Pleas of each county, any two of whom shall be a quorum, shall compose the Court of Quarter Sessions of the Peace, and Orphans' Court thereof; and the register of wills, together with the said judges, or any two of them, shall compose the Register's Court of each county.

SEC. 8. The judges of the Courts of Common Pleas shall, within their respective counties, have the like powers with the judges of the Supreme Court to issue writs of *certiorari* to the justices of the peace, and to cause their proceedings to be brought before them, and the like right and justice to be done.

SEC. 9. The president of the court in each circuit within such circuit, and the judges of the Court of Common Pleas within their respective counties, shall be justices of the peace, so far as relates to criminal matters.

SEC. 10. A register's office, for the probate of wills, and granting letters of administration, and an office for the recording of deeds, shall be kept in each county.

SEC. 11. The style of all process shall be "The Commonwealth of Pennsylvania." All prosecutions shall be carried on in the name and by the authority of the Commonwealth of Pennsylvania, and conclude "against the peace and dignity of the same."

ARTICLE VI.

Of Sheriffs and Coroners.

SECTION 1. Sheriffs and coroners shall, at the times and places of election of representatives, be chosen by the citizens of each county. One person shall be chosen for each office, who shall be commissioned by the Governor. They shall hold their offices for three years, if they shall so long behave themselves well, and until a successor be duly qualified; but no person shall be twice chosen or appointed Sheriff in any term of six years. Vacancies in either of the said offices shall be filled by an appointment, to be made by the Governor, to continue until the next general election, and until a successor shall be chosen and qualified as aforesaid.

Of the Militia.

SEC. 2. The freemen of this Commonwealth shall be armed, organized, and disciplined for its defense, when, and in such manner as may be directed by law. Those who conscientiously scruple to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service.

Of Public Officers.

SEC. 3. Prothonotaries of the Supreme Court shall be appointed by the said court for the term of three years, if they so long behave themselves well. Prothonotaries and clerks of the several other courts, recorders of deeds and registers of wills, shall, at the times and places of election of representatives, be elected by the qualified electors of each county, or the districts over which the jurisdiction of said courts extends, and shall be commissioned by the Governor. They shall hold their offices for three years, if they shall so long behave themselves well, and until their successors shall be duly qualified. The legislature shall provide by law the number of persons in each county who shall hold said offices, and how many and which of said offices shall be held by one person. Vacancies in any of the said offices shall be filled by appointments to be made by the Governor, to continue until the next general election, and until successors shall be elected and qualified as aforesaid.

SEC. 4. Prothonotaries, clerks of the Peace and Orphans' Courts, recorders of deeds, registers of wills, and sheriffs, shall keep their offices in the county town of the county in which they respectively shall be officers, unless when the Governor shall, for special reasons, dispense therewith, for any term not exceeding five years after the county shall have been erected.

Of Commissions.

SEC. 5. All commissions shall be in the name and by the authority of the Commonwealth of Pennsylvania, and be sealed with the State seal and signed by the Governor.

Of State Treasurer.

SEC. 6. A State Treasurer shall be chosen by the qualified electors of the State, at such times, and for such term of service as shall be prescribed by law.

Of Justices of the Peace and Aldermen and other Officers.

SEC. 7. Justices of the peace, or aldermen, shall be elected in the several wards, boroughs, and townships, at the time of the election of constables, by the qualified voters thereof, in such number as shall be directed by law, and shall be commissioned by the Governor for a term of five years. But no township, ward, or borough shall elect more than two justices of the peace or aldermen, without the consent of a majority of the qualified electors within such township, ward, or borough.

SEC. 8. All officers whose election or appointment is not provided for in this Constitution, shall be elected or appointed as shall be directed by law. No person shall be appointed to any office within any county who shall not have been a citizen and an inhabitant therein one year next before his appointment, if the county shall have been so long erected; but if it shall have not been so long erected, then within the limits of the county or counties out of which it shall have been taken. No member of Congress from this State, or any person holding or exercising any office or appointment of trust or profit under the United States, shall, at the same time, hold or exercise any office in this State to which a salary is, or fees or perquisites are by law annexed, and the legislature may by law declare what State offices are incompatible. No member of the Senate, or of the House of Representatives, shall be appointed by the Governor to any office during the term for which he shall have been elected.

Of Misbehavior in Office.

SEC. 9. All officers for a term of years shall hold their offices for the terms respectively specified, only on the condition that they so long behave themselves well; and shall

be removed on conviction of misbehavior in office, or of any infamous crime.

Duelling.

SEC. 10. Any person who shall, after the adoption of the amendments proposed by this convention to the Constitution, fight a duel, or send a challenge for that purpose, or be aider or abettor in fighting a duel, shall be deprived of the right of holding any office of honor or profit in this State, and shall be punished otherwise in such manner as is, or may be, prescribed by law; but the Executive may remit the said offense and all its disqualifications.

ARTICLE VII.

Education.

SECTION 1. The legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the State, in such manner that the poor may be taught gratis.

SEC. 2. The arts and sciences shall be promoted in one or more seminaries of learning.

Religious Societies and Corporations.

SEC. 3. The rights, privileges, immunities, and estates of religious societies and corporate bodies shall remain as if the Constitution of this State had not been altered or amended.

SEC. 4. The legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, with requiring such corporation or individual to make compensation to the owners of said property or give adequate security therefor before such property shall be taken.

ARTICLE VIII.

The Oath of Office.

Members of the General Assembly, and all officers, executive and judicial, shall be bound, by oath or affirmation, to support the Constitution of this Commonwealth, and to perform the duties of their respective offices with fidelity.

ARTICLE IX.

Declaration of Rights.

That the general, great, and essential principles of liberty and free government may be recognized and unalterably established. We declare that

SECTION 1. All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

SEC. 2. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness. For the advancement of these ends, they have at all times inalienable and indefeasible right to alter, reform or abolish their government, in such manner as they may think proper.

SEC. 3. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, that no man can, of right, be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship.

SEC. 4. That no person who acknowledges the being of a God, and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office, or place of trust or profit, under this Commonwealth.

SEC. 5. That elections shall be free and equal.

SEC. 6. That trial by jury shall be as heretofore, and the right thereof remain inviolate.

SEC. 7. That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights

of man; and every citizen may freely speak, write and print on any subject; being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and all indictments for libels, the jury shall have a right to determine the law and the facts, under the directions of the court, as in other cases.

SEC. 8. That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that no warrant to search any place or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.

SEC. 9. That in all criminal prosecutions, the accused has a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage: he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers, or the law of the land.

SEC. 10. That no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; or by leave of the court for oppression or misdemeanor in office. No person shall, for the same offense, be twice put in jeopardy of life or limb, nor shall any man's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made.

SEC. 11. That all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the Commonwealth, in such manner, in such courts and in such cases, as the legislature may by law direct.

SEC. 12. That no power of suspending laws shall be exercised, unless by the legislature or its authority.

SEC. 13. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

SEC. 14. That all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

SEC. 15. That no commission of Oyer and Terminer or Jail Delivery shall be issued.

SEC. 16. That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law.

SEC. 17. That no *ex post facto* law, nor any law impairing contracts, shall be made.

SEC. 18. That no person shall be attainted of treason or felony by the legislature.

SEC. 19. That no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth; that the estates of such persons as shall destroy their own lives, shall descend or vest as in case of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.

SEC. 20. That the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.

SEC. 21. That the right of the citizens to bear arms, in defense of themselves and the State, shall not be questioned.

SEC. 22. That no standing army shall, in time of peace, be kept up without the consent of the legislature; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

SEC. 23. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

SEC. 24. That the legislature shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment to which shall be for a longer term than during good behavior.

SEC. 25. That emigration from the State shall not be prohibited.

SEC. 26. To guard against transgressions of the high powers which we have delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.

ARTICLE X.

Of Amendments.

Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of the members elected to each house, such supposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published, three months before the next election, in at least one newspaper in every county in which a newspaper shall be published; and if in the legislature next afterwards chosen such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid, and such proposed amendment or amendments shall be submitted to the people in such manner and at such time, at least three months after being so agreed to by the two houses, as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments, by a majority of the qualified voters of this State voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted to the people oftener than once in five years: *Provided*, That if more than one amendment be submitted, they shall be submitted in such manner and form that the people may vote for or against each amendment separately and distinctly.

ARTICLE XI.

Legislative Powers.

SECTION 1. The State may contract debts, to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars, and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

SEC. 2. In addition to the above limited power, the State may contract debts to repel invasion, suppress insurrection, defend the State in war, or to redeem the present outstanding indebtedness of the State; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

SEC. 3. Except the debts above specified, in sections 1 and 2 of this article, no debt whatever shall be created by or on behalf of the State.

SEC. 4. To provide for the payment of the present debt, and any additional debt contracted as aforesaid, the legislature shall, at its first session after the adoption of this amendment, create a sinking fund, which shall be sufficient to pay the accruing interest on such debt, and annually to reduce the principal thereof by a sum not less than two hundred and fifty thousand dollars; which sinking fund shall consist of the net annual income of the public works, from time to time owned by the State, or the proceeds of the sale of the same, or any part thereof, and of the income or proceeds of sale of stocks owned by the State, together with other funds or resources that may be designated by law. The said sinking fund may be increased from time to time, by assigning to it any part of the taxes, or other revenues of the State, not required for the ordinary and current expenses of govern-

ment, and unless in case of war, invasion or insurrection, no part of the said sinking fund shall be used or applied otherwise than in extinguishment of the public debt, until the amount of such debt is reduced below the sum of five millions of dollars.

SEC. 5. The credit of the Commonwealth shall not, in any manner or event, be pledged or loaned to any individual, company, corporation or association; nor shall the Commonwealth hereafter become a joint owner or stockholder in any company, association or corporation.

SEC. 6. The Commonwealth shall not assume the debt, or any part thereof, of any county, city, borough or township; or of any corporation or association; unless such debt shall have been contracted to enable the State to repel invasion, suppress domestic insurrection, defend itself in time of war, or to assist the State in the discharge of any portion of its present indebtedness.

SEC. 7. The legislature shall not authorize any county, city, borough, township or incorporated district, by virtue of a vote of its citizens, or otherwise, to become a stockholder in any company, association or corporation; or to obtain money for, or loan its credit to any corporation, association, institution or party.

SEC. 8. No bill shall be passed by the legislature, containing more than one subject, which shall be clearly expressed in the title, except appropriation bills.

SEC. 9. No bills shall be passed by the legislature granting any powers or privileges, in any case, where the authority to grant such powers or privileges has been or may hereafter be, conferred upon the courts of this Commonwealth.

ARTICLE XII.

Of New Counties.

No county shall be divided by a line cutting off one-tenth of its population (either to form a new county or otherwise) without the express assent of such county, by a vote of the electors thereof; nor shall any new county be established, containing less than four hundred square miles.

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No. 36. *October Term, 1889.*

IN THE

Supreme Court of the United States.

Pennsylvania Railroad Company,
Plaintiff in Error,

vs.

P. H. Miller, administrator of George R. Duncan, deceased,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN REPLY.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Plaintiff in Error.

Allen, Lane & Scott, Printers, Nos. 229, 231, and 233 South Fifth Street, Philadelphia.

Supreme Court of the United States.

Pennsylvania Railroad Company

vs.

P. H. Miller, Administrator.

October Term, 1889.

No. 36.

Brief of Plaintiff in Error in Reply.

The four propositions of the defendant in error will be considered in their order.

The *first* is, that there is no contract in the charter of the plaintiff in error that it shall be exempted from liability to make just compensation for property injured and destroyed by the construction or enlargement of its works, highways, or improvements.

The argument in support of this proposition, as indeed of all the propositions submitted by the defendant in error, substantially ignores by evading the central position of the plaintiff in error; namely, that—

The State sold to the plaintiff in error property for which it received $7,500,000, and, by the terms of the sale, stipulated that the property should be enjoyed under the provisions of the charter; which charter defined, and by defining limited, its liability to direct as opposed to consequential damages.

And that it is a violation of the contract of sale subsequently to extend this liability to cases not within terms of the contract.

The defendant in error admits (Brief of Defendant in Error, page 13), that the liability of this railroad company was defined by its charter as follows:—

"In the compensation proper for the damage done or likely to be done or sustained by any such owner or owners of such lands or materials which said company may *enter upon, use, or*

take away in pursuance of the authority given them by the act to which this is a supplement."

He also admits (page 9) that this phraseology, by repeated adjudications of the courts, was interpreted to mean merely liability for the actual seizure of property.

He further admits (page 2) that this railroad company purchased the property in 1857 with the solemn undertaking of the State as vendor, that it should be held and used by the company under the provisions of the act of incorporation and supplement, which, as above stated, limited its liability to compensation for *taking* property.

If there was not a contract here that no other or more burdensome measure of liability for the use and enjoyment of the property and rights purchased should be imposed, the meaning of words must go for nothing.

If this property had been sold for the consideration of $7,500,000 and the assumption of certain specified money liabilities of the State, no one would pretend that the State could subsequently compel the purchaser to assume other and larger money liabilities. The argument of the defendant in error as applied to such a case would be that the fact that the State did not specifically declare that it would not require more of the purchaser, indicates that it might lawfully require more. There are implied undertakings in grants, as is illustrated in the ruling of Fletcher *vs.* Peck, that a grant or sale to one party carries with it a contract not to sell the same thing to another. It is equally an implied contract in an executed sale that the price paid or assumed, whether it be paid in money or securities, and whether it be assumed in the form of debt to the vendee or of liability to others for transactions growing out of the authorized use of the property, shall not be increased without the consent of the vendee.

It is needless to say that the statement of the position of the railroad company made by counsel for the defendant in error is a travesty of it. It is a man of straw set up for the purpose of being easily overthrown.

It is not contended, as suggested by defendant in error (Brief, page 14), that this railroad company had a vested right in a ruling of the Supreme Court of the State which prohibited such court from changing its ruling.

The ruling of the court is relied on as interpreting the contract, not as constituting the contract. If the Supreme Court of Pennsylvania had overruled its own decisions, and declared that a liability for property taken carried with it a liability for property injured, the plaintiff in error would not be here.

Nor is it argued that there was a charter contract with the State to do wrong, the obligation of which the State might not subsequently impair. On the contrary, it is distinctly admitted (original Brief, page 63) that this railroad company is subject at all times to the recognized police powers of the State, expressing themselves now in laws prohibiting the public against danger, as in the enactment of fence laws, and now in laws compensating loss from negligence.

It is argued that the charter of the plaintiff in error is subject to the general laws and to such changes as may be made therein.

It is submitted that this proposition is irrelevant to the case. The question is not whether the charter of this railroad company, *as a charter*, is subject to the general laws of the Commonwealth, but whether the company before availing itself of its purchase of property and rights *bought* in 1857, may be required to pay more for them than it undertook to pay, by having to submit itself to a larger measure of liability for their enjoyment than it assumed.

The case of *In re* Provident Institution for Savings, 9 Cush., 604, 611, merely establishes that a right or power granted by a general law may be modified by a general law. In our case the right claimed of a certain measure of liability was sold to the railroad company for value. It was not conferred by a general law, nor indeed by any law, as such, excepting as the enabling act of 1857, which was really part of the deed passing title, was a special law. It is true the exemption of

railroad companies generally from liability for consequential damages at the time was established by a ruling upon a general law, but the exemption in this case was made in the deed to the company. The terms of the general law, with its interpretation, were incorporated therein and made the basis of a contract for value.

The doctrine established by Newton *vs.* Commissioners, 100 U. S., 548, 557, is that a public or municipal corporation or the general political public as such cannot avail itself of the rule of the Dartmouth College case. It did not assert that a law impairing private grants would be cured of constitutional objections by having a public purpose to subserve, and being broad enough in its terms to relate to the whole public. If that were the true doctrine, the law of New Hampshire passed upon in the Dartmouth College case could have been sustained had it been drafted in general terms applying to all colleges in the State situated similarly to the college in question. Tax laws are usually public laws establishing a system of taxation for the State. But the fact that they are public laws is of no avail to impose their provisions upon a corporation having a contract with the State for special taxation.

It was needless for the defendant in error to elaborate with citations the doctrine that the legislature may impose upon all corporations duties of protection to the public against danger to life and limb, and may pass all laws recognized as conducive to public security. When, however, the State, whether in its capacity of legislator or in any other capacity, assumes to confer upon its citizens a statutory right as against a limited class, viz., the right of consequential damages against municipal and other corporations and individuals invested with the State's power of eminent domain, which right it refuses to recognize as applied to itself, and which it therefore recognizes as a right much less than absolute, it may not bestow it so as to impair the value of property bought from it with a measure of liability attached thereto negativing the right.

But, it is asked, if the Supreme Court of the State could change its ruling without thereby impairing the obligation of a contract, why cannot the same result be effected by legislation? Why, simply because the court is not a contracting body, and the legislature is. A ruling of a court is not a contract. A deed under the seal of the State, authorized by the legislature of the State, is a contract.

An analogy is attempted to be forced between the imposition *de novo* of a liability for the taking of property and for injury to property. It is urged that there is no difference as to their effect upon the rights of theretofore-chartered corporations.

A moment's reflection will disclose a very great difference between the cases, as applied to the special property of the Pennsylvania Railroad Company sought to be affected here. The imposition of a liability to compensate for the taking of property was made not only by general law but by special provisions of the charter of 1846 and the amendments thereto. A rule and measure of liability were thereby specially established. The State considered the matter of liability and deliberately fixed it. The property was bought upon the basis of it. The minds of the parties met upon the subject. The case of the establishment of a liability for the taking of property, where none had previously been known, and where the only protection against it is the existence of a charter silent upon the subject, is no analogy to the extension of a measure of liability once fixed, and fixed, not by charter merely, but by a solemn deed of the Commonwealth, wherein the State stepped down from its position as legislator and became a contracting party whose acts are to be tested by the same principles as the act of other contracting parties.

It is further argued that the present case is analogous to that of enactments giving rights of action to representatives of persons killed by railroad companies.

The difference between such cases and the present is very marked. The theory supporting all such statutes is that the legislature may protect the public against negligent, and, therefore, wrongful, acts of corporations. And of course it matters not whether the specific offense was cognizable at common law or not. No person or corporation can have a contract or other right to act negligently. And the legislature may at all times make corporations guilty of negligence pay damages to the relatives of persons killed, or may inflict a penalty payable to the State. The principal fact which starts liability in these cases is absent in consequential damage cases, namely, negligence. The railroad company has obtained from the State certain franchises. The exercise of these franchises in a proper way cannot be a wrong, and cannot be made a wrong so long as the franchise exists. The only way for the State to relieve itself of the obligation to respect the franchise as granted, is to buy it back and pay for it.

The proposition now is, that, after the State has sold to the corporation the right to exercise a particular franchise upon terms whose meaning is elucidated by decisions of the court of highest authority in the State, namely, upon assuming the obligation to pay for property *physically taken*, those terms can be altered by the State on the ground that the State, as sovereign, may create a remedy for a previously existing wrong. But is it not clear that with the right to do this specific act, there can be no wrong in the non-negligent performance of the act according to the terms authorizing it? These observations are supported by the reasoning of the authorities cited by the defendant in error, pages 24, 25.

It is sought to establish liability in the present case by assuming that an individual would be liable under the same circumstances. It is confidently submitted that whether a corporation or an individual were entitled to the benefit of the contract of the State specifically entered into in 1857 with this railroad company, the party so entitled, whether corporation or individual, would be exempt from the liability sought to be

imposed. It was said by the Supreme Court of Pennsylvania, in Monongahela Navigation Co. *vs.* Coon, 6 Penna. St., 382, that the *locum tenens* of the State (whether a corporation or an individual) is entitled to the protection of the State against the imposition of liabilities not allowed as against the State itself. In any aspect of the law this is eminently sound doctrine as applied to the transaction of sale in 1857.

It is not seen that there is any difference as to the right of the plaintiff in error in the premises, whether or not it was exercised before the Constitution of 1874 took effect. This was considered very fully in the main brief of the plaintiff in error. The argument of the defendant in error practically is, that the next day after the State of Pennsylvania sold this property and these franchises to the railroad company in 1857, and got the purchase-money into its treasury, it could practically have taken them back or rendered them valueless by the imposition of liabilities not recognized by the law at the time, and not assumed by the railroad company. And it could have done this, not because the State had full control over the property indefinitely after the grant, but only until the grant was exercised. As if the vendor has any control over the property sold for the purpose of reducing the value after the moment of sale! It is needless, of course, to show that the logic of the argument of the defendant in error here would be, to impose upon the grant the impractical condition that all the franchises bought should be exercised immediately upon the completion of the purchase.

The argument of the defendant in error that the present contract cannot be established without showing an express undertaking on the part of the Commonwealth, was fully considered in advance in the original brief of plaintiff in error, pages 19-35.

An examination of the legislation and contract of sale consequent thereto, which conferred the right exercised by the

railroad company, it is believed, will make it appear that it was the intent of the Legislature of Pennsylvania, in the sale of 1857, to fix a measure of liability for damage which was as essential a part of the grant as the right to exercise the franchises sold.

Although the exemption from a higher measure of liability was in a certain sense an implied contract, it had the force of an express contract, in the same sense as the executed contract of sale considered in Fletcher *vs.* Peck contained within it the obligation not to withdraw the grant or to abstract from it in any essential particular.

The *second* proposition of the defendant in error is, that the privilege of taking private property for public use is such an element of sovereignty that it cannot be granted so as to preclude future legislative control of its subsequent exercise.

It was the distinct purpose of the contract clause of the Federal Constitution to limit the sovereignty of the States. If, as we think has been shown, there was a contract with the Pennsylvania Railroad Company in the transaction of 1857, it is idle to contend that any power reserved in the States can be invoked against its terms. State courts, jealous of the prerogatives of their respective autonomies, have sometimes failed to observe the full significance of the clause in question. But they have always been corrected by this court when occasion required, as in the cases declaring the power of the State to limit itself in the matter of future taxation.

The right of a State to make such a contract as was entered into here rests upon even stronger grounds than that of the State to make a contract exempting a corporation or individual from future taxation. Taxation is a function of the State eminently necessary to its life and growth, yet it has been held that for a proper consideration the State may engage to relieve of future taxation, but only on the terms that the equivalent of value for such relief has been paid or undertaken to be paid.

Eminent domain, or the right of taking private property for uses public in their nature, is commonly exercised in the development of the State, but, as will readily be seen, is not so necessary or so vital a prerogative as that of procuring money by taxation to carry on the government of the State itself, for without it the State could well exist, as it could not if it were without the taxing power. The argument that supports the first sort of contract is therefore readily available for the other. The theory upon which they both rest is that the State steps down from its position as sovereign and engages, for a proper consideration moving to itself, to do or not to do a particular thing. This, of course, does not pass from the State its proper and necessary police control over the subject-matter of the contract. It merely inhibits it from imposing, under the guise of legislation not strictly police in its nature, upon the thing granted, burdens practically stipulated against in the contract.

The *third* proposition of the defendant in error is that the plaintiff in error subjected its contract rights to alteration by the acceptance of legislative benefits subsequent to the act of 1855.

It is first of all assumed under this head that the transactions of 1857, culminating in the transfer of the property of the Commonwealth to the Pennsylvania Railroad Company, were legislative in their character. It is gravely contended that the purchase of the State's property for $7,500,000 was the acceptance of subsequent legislation, just as if the whole transaction was not one of bargain and sale. The State in its legislative capacity had nothing to do with it, excepting to authorize the consummation of the sale which was effected by deed executed July 31st, 1857.

The proposition of the defendant in error here is the altogether novel one that the railroad company in 1857 paid the State $7,500,000 for the privilege of sacrificing its theretofore recognized rights. Or, differently stated, that the railroad company paid the sum of $7,500,000, and got in return, not an inviolable right of property, but merely the possession of

it until the State should choose, the next day perhaps, to withdraw the grant without compensation, and that in addition thereto the corporation thereby surrendered all its previously vested immunities. It is needless to say that this would be practically arguing that the State, under the guise of a sale of its property, could confiscate the theretofore existing rights of the vendee, and could also at its pleasure withdraw from the vendee the thing sold without paying back any part of the purchase-money.

It is very plain that the transaction of 1857 was in no just sense the acceptance of legislative benefits. It was purely and simply a purchase of property.

The defendant in error next urges that the railroad company by accepting the act of 1868 exposed its theretofore acquired rights to withdrawal. This he supposes follows from the doctrine of Monongahela Navigation Company *vs.* Coons, 6 Penna. St., 379, that the express surrender of theretofore existing rights in consideration for a present grant is enforceable. It is needless to argue again, after the elaboration of the point in the original brief, that the case referred to is no authority for the contention that the mere acceptance of subsequent legislation having nothing to do with the main grant, and containing nothing within it stipulating that the new legislation is offered upon terms of surrender of rights theretofore acquired, nevertheless, *ipso facto*, exposes those rights to forfeiture. Such a doctrine is wholly without the support of the authority cited, or of any other authority.

It is argued at page 41 of the brief of the defendant in error, as if it were conclusive of the whole case, that it was the law in 1857 that wherever a corporation held its charter subject to the legislature's right to alter, revoke, or annul the same, it was competent to impose liability for consequential damages upon the corporation. This has not been denied by the plaintiff in error. The proposition, however, does not dispose of several positions of the plaintiff in error. (1.) That

this railroad company, dating its charter rights from 1846, was protected against any subsequent alteration, amendment, or annulment of them without its own consent and was therefore not within the provisions of the act of 1855. (2.) That while subsequent grants of charters of a corporation would be subject to this right of alteration, annulment, or repeal, yet subsequent sales of property would not be. (3.) That no subsequent acceptance of legislation upon the terms contained in it as offered would imperil the previous grant, unless so stipulated, as was stipulated in the grant considered in Monongahela Navigation Co. *vs.* Coons. (4.) And that a sale of property, as was the transaction of 1857, on specific terms and expressly under the provisions of a charter then free from alteration, carried with it the right to exercise the rights bought with the property, however it might be that rights not specially connected with the lands bought might be subject to other rules. (5.) And that, further, in any event, the only authority competent to effect the alteration, annulment, or repeal, namely, the legislature, has never acted in the premises so as to impose the liability contended for here.

The essential vice of the argument of the defendant in error, as the vice of the opinion of the court below, it is necessary to reiterate, is the assumption that the right claimed here was wholly or even principally a charter right, and not a property right bought for value. The Supreme Court of New Jersey, in State, United R. R. & Canal Co., Pros. *vs.* Commissioner of Railroad Taxation, 37 N. J. Law Reports, 240, 250, a case in some respects similar to the present, recognized and clearly stated the proposition that where land is bought and paid for by a corporation, the power of the State over it is not to be measured by the legislative power of the State over the franchises of the corporation to which it may have been sold, but only by the terms of the deed of sale. The United Railroad and Canal Company bought from the State the lands in question on the terms contained in the grant. Subsequently it was sought to subject the corporation in respect of the

lands to the general tax law of the State. The court, in declaring that the lands were taxable no further than was provided in the grant, said (page 249):—

"But a part of the property returned being held by the prosecutors under a special grant by the legislature, the right of taxation over it may also involve other considerations than those already discussed. The premises referred to are what is known as the Harsimus Cove property, which was conveyed to the prosecutors by an act of the legislature, passed the 30th of March, 1868. * * * For this conveyance of lands with the rights, privileges, and immunities connected therewith, the grantees paid to the State, as the consideration, the sum of $500,000, that sum being adjudged to be the value by the commissioners under the provisions of the act. *This is not a grant of franchises. The instrument of grant is not a charter* within the sixth section of the general incorporation act. (Nix. Dig., 168.) *It is a conveyance of land for an actual and not a presumptive consideration. The grantees take not as the recipients of corporate franchises, but as owners by the same title as would be acquired by an individual grantee. The thing granted is the premises described, with all the rights and privileges thereto annexed.* The extinguishment of highways already laid out—the surrender of the sovereign power to open highways in the future—the covenant not to grant any lands or easements in front of the premises so as to interpose another right between them and the navigable waters, and the exemption from general taxation, are rights which give value to the estate granted. By the operation of the grant, these rights are annexed to the lands and will pass with them as appurtenances to any subsequent grantee. State of New Jersey *vs.* Wilson, 7 Cranch, 154.

The constitutional prohibition forbidding the passage by the States of any law impairing the obligation of contracts, embraces all contracts executed or executory, whether between private individuals, or between the State and individuals or corporations. Green *vs.* Biddle, 8 Wheat, 1. A grant of lands which are part of the public domain, when once made by the State, cannot be annulled by a subsequent act of the legisla-

ture, which assumed to annul the grant because it was fraudulently obtained. Fletcher *vs.* Peck, 6 Cranch, 87. This constitutional protection is thrown over every part of the grant, *as well over the legal incidents annexed, as over the thing granted.*

The *fourth* proposition of the defendant in error is that the plaintiff in error accepted the benefit of a general law passed since the Constitution of 1874, and is therefore subject to the provisions of that Constitution.

It is argued under this head that the railroad company derived its authority to occupy Filbert Street longitudinally from the act of 1874 and the ordinance of 1879.

The whole argument of the defendant in error at this point was anticipated in the brief of the plaintiff in error as well as by the Supreme Court of the State in McAboy's Appeal, 107 Penna. St., 548, and Cleveland and Pittsburg Railroad Co. *vs.* Speer, 56 Penna. St., 325, and also in the opinion of the lower court in the present case itself.

It is only necessary to refer to those cases for a complete answer to the position of the defendant in error, assuming for argument's sake that the State court's interpretation of the law of the State conferring the right to build this structure on Filbert Street is not conclusive in this court, which it undoubtedly is when no appeal was taken from it.

These cases specifically decided that railroad companies with powers such as this company possessed, were entitled as the *locum tenens* of the State to occupy the public highways longitudinally. It is merely beating the air for this defendant in error to argue the subjection of this railroad company to the provisions of a later statute of the State in no respect relevant to the case, and an ordinance of the city of Philadelphia, when all the power they conferred or might be held to confer, was previously exercisable by the railroad company.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Plaintiff in Error.

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JAMES. H. McKENNEY.
CLERK.

No. 291. October Term, 1888.

United States Supreme Court.

The Pennsylvania Railroad Company,

Plaintiff-in-Error,

vs.

P. H. Miller, Administrator of George R. Duncan, Deceased,

Defendant-in-Error.

Brief of Argument for Defendant-in-Error.

M. Hampton Todd,
David T. Watson,
George W. Biddle,
Of Counsel with Defendant-in-Error.

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Law Department,
Times Printing House,
725 Chestnut Street,
Philadelphia.

SUPREME COURT OF THE UNITED STATES.

October Term, 1888. No. 291.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

P. H. MILLER, Administrator of GEORGE R. DUNCAN, Deceased,
Defendant-in-Error.

COUNTER-STATEMENT AND ARGUMENT FOR DEFENDANT-IN-ERROR.

The Pennsylvania Railroad Company was incorporated by Act of General Assembly of the Commonwealth of Pennsylvania, approved April 13, 1846 (P. L. 312), with power to build a railroad from Harrisburg to Pittsburgh (Record, page 131), which was subsequently constructed and operated in connection with the Harrisburg, Portsmouth, Mount Joy and Lancaster Railroad, and with that portion of the main line of public works known as the Philadelphia and Columbia Railroad, which road, in the year 1857, at the time of its sale to the plaintiff-in-error, extended from a point eighty-seven feet west of the Market Street Bridge across the river Schuylkill, in Philadelphia to Columbia.

Section 12 of the original Act of incorporation providing the method for ascertaining the compensation

"for the damage done, or likely to be done or sustained by any such "owner or owners of such lands or materials, which said Company may "enter upon, use, or take away in pursuance of the authority herein- "before given,"

was supplied by Section 4 of the Act amending its Charter approved 27th March, 1848 (P. L., page 274, Record, page 133), which provides for the appointment of a jury to assess damages

"when the Pennsylvania Railroad Company cannot agree with the owner "or owners of any lands or materials for the compensation proper for the "damage done, or likely to be done to or sustained by any such owner or "owners of such lands or materials, which said Company may enter upon, "use or take away in pursuance of the authority given them by the Act "to which this is a supplement."

By Act of Assembly approved 3d May, 1855 (*P. L. 423, Brightley's Purdon's Digest, page 352, Sec. 82*), it is enacted that

"Every charter of incorporation granted, or to be granted, shall be "deemed and taken to be subject to the power of the Legislature, unless "expressly waived therein, to alter, revoke, or annul the same whenever "in their opinion it may be injurious to the citizens of the Common- "wealth; in such manner, however, that no injustice shall be done to "the incorporators, and as fully as if the reservation of said power had "been therein expressed."

By Act of Assembly approved May 16, 1857 (P. L., 519, Record, page 135–142), the Commonwealth of Pennsylvania authorized the sale of the main line of public works, including therein the Philadelphia and Columbia Railroad. Section 11 thereof is as follows (Record, page 141):

"That should any company already incorporated by this Commonwealth "become the purchaser of said main line they shall possess, hold and "use the same under the provisions of their act of incorporation and "any supplements thereto, modified, however, so as to embrace all the "privileges, restrictions and conditions granted by this act in addition

"thereto, and all provisions in said original act and any supplements "inconsistent with the privileges herein granted shall be, and the same "are hereby repealed."

Under the provisions of this Act, as modified by the decree of the Supreme Court of Pennsylvania in the case of *Mott et al.* vs. *The Pennsylvania Railroad Company et al.*, 6 *Casey*, 9, the plaintiff-in-error on the twenty-fifth day of June, 1857, became the purchaser of the main line of public works.

The Court in that case, among other things, ruled that

"The Legislature has no power to alienate any of the rights of "sovereignty, such as that of taxation, so as to bind future Legislatures "and any contract to that effect is void;"

And that

"The rights of sovereignty are a trust to be exercised for the benefit "of the people as occasion may require; not to be abandoned or bar-"gained away at the discretion of their agents;"

And ordered that the sale should be made in accordance with these views.

At a special meeting of the stockholders of the Pennsylvania Railroad Company duly convened and held July 20, 1857, and by adjournment July 23, 1857, the provisions of the aforesaid "Act for the sale of the main line of the public works," approved May 16, 1857, so far as the same in any way relate to, or affect said Company, were accepted (Record, page 142). The deed poll from the Commonwealth to the Pennsylvania Railroad Company, conveying the property purchased under this Act, is dated July 31, 1857. (Record, page 143.)

The fourth amendment of 1857 to the Constitution of Pennsylvania, Section 26 of Article I is:

"The Legislature shall have the power to alter, revoke, or annul any "charter of incorporation hereafter conferred by or under any special; "or general law whenever in their opinion it may be injurious to the "citizens of the Commonwealth in such manner, however, that no in-"justice shall be done to the corporators."

Since the Act of 1855, and the constitutional amendment of 1857, the plaintiff-in-error has accepted a number of amendments to its charter, notably two, namely: first, the limitation of liability Act, approved April 4, 1868, and accepted April 15, 1868 (Record, page 149); and second, the Act of March 12, 1873 (P. L. 253), which is entitled "An Act to authorize the Pennsylvania Railroad Company to occupy certain portions of Delaware Avenue, in the City of Philadelphia, for railroad purposes, and make connections therewith, and to acquire property near or convenient to the said avenue for depot and other railroad purposes," and recites and enacts as follows, namely:

"*Whereas*, For the purpose of increasing the business facilities and "commercial advantages of the City of Philadelphia, the said city has, "by ordinances, authorized the widening of a portion of Delaware "Avenue to the width of eighty feet, and has, by a resolution of its "Councils, authorized the Pennsylvania Railroad Company to occupy "the easternmost thirty feet thereof as re-located and widened for rail-"road purposes, now therefore,

"SECTION 1.—*Be it enacted, etc.* That the Pennsylvania Railroad "Company be, and is hereby authorized to construct a double track "railroad upon the easternmost thirty feet of Delaware Avenue in said "city, as relocated between Queen and Washington Streets and as "widened between the north side of Dock Street and said Christian "Street, with such connections with its Delaware River extension, and "turnouts as may be necessary."

In the Constitution of Pennsylvania, which went into effect January 1, 1874, it is provided by Section 8 of Article XVI that—

"Municipal and other corporations and individuals invested with "the privilege of taking private property for public use shall make just "compensation for property taken, injured or destroyed by the construc-"tion or enlargement of their works, highways or improvements, which "compensation shall be paid or secured before such taking, injury or "destruction."

Section 2 of Article XVI is:

"The General Assembly shall not remit the forfeiture of the charter "of any corporation now existing or alter or amend the same or pass

"any other general or special law for the benefit of such corporation, "except upon the condition that such corporation shall thereafter hold "its charter subject to the provisions of this constitution."

The Act of Assembly approved June 9, 1874 (P. L. 282), authorizes

"The proper authorities of any city to enter into contracts with any of "the railroad companies whose roads enter their limits whereby the said "railroad companies may *re-locate, change, or elevate* their railroads "within said limits in such manner as in the judgment of such authori- "ties may be best adapted to secure the safety of lives and property and "promote the interest of said city and for that purpose the said authori- "ties shall have power to do all such acts as may be necessary and "proper to effectually carry out such contracts."

George R. Duncan, in the year 1876, became the owner in fee of the premises situate at the northwest corner of Twenty-third and Filbert Streets in the City of Philadelphia extending along the west side of Twenty-third Street two hundred and thirty feet and along the north side of Filbert Street about four hundred feet to the Warden's line of the river Schuylkill.

In the fall of 1879 the plaintiff-in-error projected and began the construction of its elevated railroad from West Philadelphia, thence over its own property to the westernmost side of the river Schuylkill at a point opposite Filbert Street; thence by a fast bridge over the Schuylkill river to the eastern side thereof; thence on a series of iron pillars, elevated at about twenty feet above the existing grade of the street, along Filbert Street eastward and directly in front of Mr. Duncan's property, occupying the entire road-bed of the street to Shock Street, a distance of over a quarter of a mile; thence curving off of the public highway on to its property purchased and held in fee; thence on archways to Fifteenth and Market Streets, its present terminal passenger station.

This location and construction of its Elevated Railroad longitudinally on Filbert Street by the plaintiff-in-error was authorized by Ordinance of the City of Philadelphia approved

13th October, 1879 (Record, page 149), Section 3 of which provides:

"That the said Pennsylvania Railroad Company shall agree to keep "the said railroad and structures in good order and condition, and to "save the City of Philadelphia harmless, so far as the said city may be "liable therefor, from any responsibility or liability whatever that may "grow out of the establishment of said railroad."

Mr. Duncan being advised of the intention of the plaintiff-in-error to construct its elevated railroad longitudinally on Filbert Street in front of his property, filed a bill in equity, alleging want of power in the Pennsylvania Railroad Company to erect this railroad and praying for an injunction to restrain the same. The injunction was refused and on appeal to the Supreme Court of Pennsylvania the decree refusing it was affirmed. (*Duncan* vs. *Pennsylvania Railroad Co.*, 94 *Penna. St. Rep., 435.*)

Subsequently Mr. Duncan instituted the present action for the recovery of the damage sustained by him in the erection on Filbert Street in front of his property of the elevated railroad of the plaintiff-in-error, which resulted in a verdict in his favor and judgment accordingly, whereupon the defendant below sued out a writ of error to the Supreme Court of Pennsylvania, which after argument affirmed the judgment. (*Pennsylvania Railroad Co.* vs. *Duncan*, 111 *Penna. St. Rep.*, 352.) The plaintiff-in-error then removed the case to this Court, assigning for error that to require it to pay for the damage sustained by Mr. Duncan impairs the obligation of contract as expressed in its charter.

ARGUMENT.

The right of the defendant-in-error to recover damages for injuries of the character shown in this case is secured to him by Section 8, Article XVI of the Constitution of Pennsylvania.

The plaintiff-in-error contends however that to impose liability on it for such damages, even through the medium of such constitutional provision, is to impair the obligation of the contract contained in its charter, and therefore, in violation of the Constitution of the United States. We submit that no such obligation of contract is impaired because

I. There is no contract in the charter of the plaintiff-in-error that it shall be exempt from liability to "make just "compensation for property injured and destroyed by the "construction or enlargement of their works, highways, or "improvements."

II. Even if there was such a contract in its charter the privilege of taking private property for public use is such an element of sovereignty that it cannot be granted so as to preclude future legislative control of its subsequent exercise.

III. And if originally there was a valid contract of such nature in its charter, nevertheless by reason of the plaintiff-in-error having accepted additional privileges and amendments to its charter since the Act of May 3, 1855, and the amendments of the Constitution of Pennsylvania of 1857, it subjected its charter to the power of the Legislature to "alter" the same "in such manner, however, that no injustice shall be done to the corporators," and imposing liability for consequential damages does no injustice to the corporators.

IV. And by reason of the plaintiff-in-error having accepted the benefit of a general law passed since the adoption of the existing Constitution of Pennsylvania, it is within the provis-

ions of Section 2, Article XVI. of that instrument, and therefore holds its charter subject to the provisions of the Constitution.

I. There is no contract in the charter of the plaintiff-in-error that it shall be exempt from liability to "make just compensation for property injured and "destroyed by the construction or enlargement of "their works, highways or improvements."

The language of Section 8, Article XVI of the Constitution of Pennsylvania, is:

"Municipal and other corporations and individuals invested with "the privilege of taking private property for public use shall make just "compensation for property taken, injured or destroyed by the construc- "tion or enlargement of their works, highways or improvements, which "compensation shall be paid or secured before such taking, injury or "destruction. The General Assembly is hereby prohibited from depriv- "ing any person of an appeal from any preliminary assessment of "damages against any such corporations or individuals made by viewers "or otherwise and the amount of such damages in all cases of appeal "shall on the demand of either party be determined by a jury according "to the course of the common law."

In the VIII Article of the Declaration of Rights in the Constitution of 1776 it is declared:

"But no part of a man's property can be justly taken from him, or "applied to public uses, without his own consent, or that of his legal "representatives."

In Section 10 of Article IX of the Constitution of 1790 it is declared:

"Nor shall any man's property be taken or applied to public use "without the consent of his representatives, and without just compen- "sation being made."

Section 11 of the same Article is:

"That all Courts shall be open, and every man, for an injury done him "in his lands, goods, person or reputation, shall have remedy by the due

"course of law, and right and justice administered without sale, denial "or delay. Suits may be brought against the Commonwealth in such "manner, in such Courts, and in such cases as the Legislature may by "law direct."

The Constitution of 1838, in addition to the foregoing clauses contained also in Section 4 of Article VII the following new provision:

"The Legislature shall not invest any corporate body or individual with "the privilege of taking private property for public use without requiring "such corporation or individual to make compensation to the owners of "said property, or give adequate security therefor before such property "shall be taken."

Under the foregoing constitutional provisions the Supreme Court of Pennsylvania have uniformly held that the word "taken" was to be interpreted literally, that is, that it only extended to an *actual seizure* of property, and that when the injury extended only to "a depreciation of property by decreasing the enjoyment of it" the Constitution afforded no protection. The first case is that of the *Phila. & Trenton R. R. Co., 6 Wharton*, 25, which has been followed by a series of cases, the last one being that of *Struthers* vs. *Dunkirk, etc., Ry. Co., 87 Penn. St. Rep., 282.*

This doctrine has been frequently attacked as contrary to reason and natural justice; the view contended for being that property was "taken" when it was rendered less valuable; but notwithstanding these attacks and the misgivings of the Court itself the construction has been steadily adhered to.

In *O'Connor* vs. *Pittsburgh, 18 Penn. St. Rep., 189*, the Court held, notwithstanding a jury had found that by reason of a change in the grade of Grant Street and Fifth Avenue the property of the Roman Catholic congregation was seriously damaged, under the language of the Constitution the congregation was remediless. Chief Justice GIBSON, delivering the unanimous opinion of the Court, says:

"We have had this case re-argued in order to discover, if possible, "some way to relieve the plaintiff consistently with law; but I grieve

"to say we have discovered none. * * * The constitutional provi-
"sion for the case of private property *taken* for public use extends not
"to the case of *property injured or destroyed*, but it follows not that the
"*omission may not be supplied by ordinary legislation.* No property was
"taken in this instance; but the cutting down of the street consequent
"on the reduction of its grade left the building useless, and the ground
"on which it stood worth no more than the expense of sinking the
"surface of it to the common level. The loss to the congregation is a
"total one, while the gain to the holders of the property in the neighbor-
"hood is immense. The Legislature that incorporated the city never
"dreamt that it was laying the foundation of such injustice."

Again in *Monongahela Nav. Co.* vs. *Coon, 6 W. & S., 114*, which arose out of the damage done to Coon's mill, situate on a tributary of the Monongahela River, by the construction of a dam on that river, the Court say:

"Now it cannot be said that the plaintiff's mill was taken or applied
"in any legitimate sense by the State or by the company invested with
"its power; nor can it be said that he was deprived of it."

Therefore unless the State or its agent clothed with its power had "*taken*" in the sense of the foregoing rulings, some portion of the property there could be no recovery. It mattered not how small a portion was actually seized, because the owner could then, under the rule requiring a comparison of the advantages and disadvantages (*Pittsburgh, etc., Ry. Co.* vs. *McCloskey, 110 Penna. St. Rep., 436*), recover compensation not only for the land taken but also for the damages done to his remaining land; but his less fortunate neighbor whose property, possibly by reason of its character and situation, was damaged to a greater extent could recover nothing because nothing was actually seized or *taken* in the sense of seizure. Damages where no property was taken, were held to be consequential, and were not recoverable unless the charter of the particular company imposed liability therefor.

To remedy this evil, to suppress this mischief, the clause of the Constitution under consideration was adopted. The words "*injured or destroyed*" being added to cover the cases of consequential damage not included and relieved against by the word "*taken.*"

While what passed in debate in the Constitutional Convention can in no legal sense be binding upon the Court, yet in endeavoring to ascertain the old law, the mischief and the remedy, what was said by eminent lawyers in that body is entitled to some consideration.

Mr. Meredith said, *Constitutional Debates, Vol. 3, page 597:*

"The object here is, I believe, a perfectly good one. It is that "parties who are injured by works made in the *vicinity* of their property "shall be entitled to recover direct damages for the injury * * * "I would suggest * * * that companies shall be liable for injuries "done by the construction of their works to property in their vicinity."

Mr. Meredith said, page 598:

"Let us try to regulate that and restore it to the reason and exper- "ience and protection of the common law, by providing that when these "works are made, property injured by them, whether part of that prop- "erty be taken or not, shall be entitled to recover damages."

Mr. Alricks said, page 599:

"But at common law, all natural persons are responsible for conse- "quential damages."

Page 600:

"Now, I understand that corporations ought to be made responsible "the same as individuals, the same as natural persons; and to do that "we must have the provisions stated in the language we have heard "from the gentleman from Philadelphia; that is, that the owners of the "property over which a public improvement does not pass, if they are "damnified, shall be entitled to recover their damages."

Mr. White said, page 599:

"The only difficulty that is not provided for by law at present is the "damage likely to result to an individual by reason of the construction "of a road *close* to his property and injuring its value."

Mr. Alricks said, page 600:

"It is true they will be consequential damages, and the Court will "grant them as consequential damages, but it will be only on the ground

"that their property, although it is not touched by the public improve-
"ment is so convenient to that improvement that it has been materially
"damaged."

By the Constitution of 1790 the State first gave a remedy against herself or her agents for the recovery of damages for the taking of property for a public use. We have seen that this taking was construed in a narrow and literal sense which operated unjustly. The necessities of our advanced civilization, particularly in the growth of our transportation companies, early demonstrated that granting compensation for property *taken* was not sufficient to protect the citizen in the enjoyment of his property. It was soon apparent that these large carrying corporations, growing year by year, whose chief object or purpose was to earn money for their stockholders, would exercise their powers of eminent domain without regard to private right. This the State, acting in its own interest, which was common weal of all, never did. It therefore became necessary to add to the word "taken" which had already received judicial construction, the words "injured or destroyed," so as to place the delegates of the State's power on the same footing with all other citizens.

In *Pusey* vs. *City of Allegheny*, 98 *Penna. St. Rep.*, 522, Judge GORDON, page 526, says;

"Under the eighth Section of the sixteenth Article of the Constitu-
"tion of this Commonwealth, municipal as well as other corporations in
"whom are vested the right of eminent domain are required to make
"just compensation for property taken, injured or destroyed by the con-
"struction or enlargement of their works, highways or improvements.
"This is an advance upon the limitations of the right of eminent domain
"as found in the bill of rights, both of the present Constitution and that
"of 1838. Corporations in whom the Legislature has vested this right
"are by this section made liable for damages resulting to private prop-
"erty from the construction, use or alteration of their works, ways or
"other improvements; in other words, to such damages *as are ordinarily*
"*called consequential.* This being now the supreme law of the land it
"must govern the case under consideration, and it is idle to recur to
"decisions and legislation, the authority of which as to all present or
"future cases is by this provision annulled."

This doctrine has been continuously followed in all subsequent cases.

The charter of the plaintiff-in-error, as amended by Act of Assembly, approved 27th March, 1848, defines it liability to be,

> "For the compensation proper for the damage done or likely to be "done to or sustained by any such owner or owners of such lands or "materials which said company may enter upon, use or take away in "pursuance of the authority given them by the Act to which this is a "supplement."

It is manifest therefore from this language that there is no express contract that exempts the plaintiff-in-error from liability for damages of the character sustained by the defendant-in-error, nor does the plaintiff-in-error contend for exemption on such ground. If we understand the contention correctly it is that, at the time the charter was granted, the Supreme Court of Pennsylvania had held that a corporation invested with the privilege of taking private property for public use was not liable for the depreciation in the value of the property by reason of its proximity to the public works, but was only liable where there had been an actual seizure of the whole or a part, and that this ruling was by implication a part of its charter. Therefore, either to change the ruling by the Court, or to remedy the injustice by a general law, impaired the obligation of contract impliedly contained in its charter, because it made the subsequent exercises of its franchise of eminent domain more expensive. In other words, because under the rulings of the Supreme Court of the State prior to the adoption of the present Constitution, the plaintiff-in-error had the right, without liability to make compensation, to injure property by depreciating its value, counsel contend that to take away this immunity from liability and to impose the same liability on the artificial as on the natural person impairs the contract impliedly contained in its charter.

We answer (*a*) a corporation takes its charter subject to the general law of the State, and therefore, subject to such

changes as might be made in such law, and (*b*) Exemption from future general legislation can never be implied: There must be an express contract.

THE CHARTER OF THE PLAINTIFF-IN-ERROR IS SUBJECT TO THE GENERAL LAWS AND TO SUCH CHANGES AS MAY BE MADE THEREIN.

The law upon this subject was stated clearly in an opinion rendered by the justices of the Supreme Court of Massachusetts, in answer to a question submitted to them by the Senate. The question was:

"Is the corporation known as the 'Provident Institution for "'Savings in the town of Boston,' chartered in the year 1816, subject to "the general laws of the Commonwealth relating to savings banks and "institutions for savings, passed since the granting of the charter afore-"said?"

The learned Judges, after considering in detail what franchises had been conferred upon the corporation by its charter, said:

"The Legislature, by giving to the institution in Boston the privilege "of being a corporation, and of managing its proper business, did not "relinquish any power of legislating on all proper subjects of legislation.

"The institution at the time it was incorporated had the right and "power, under the general laws, to loan money at six per cent. interest; "but there can be no doubt that the Legislature could alter the law, so "that the institution could only take four or five per cent. interest. The "corporation had power under its charter to hold and dispose of prop-"erty, but there was nothing in the charter as to the mode, and of course "the property could be held and disposed of only according to the gen-"eral laws, which the Legislature might at any time alter, and the cor-"poration would be bound by the alteration."

"The corporation might indorse and negotiate promissory notes, but "only according to the general laws, as there was nothing in the charter "on the subject; but the Legislature might change the whole law on this "subject at any time, or take away altogether, by general laws, the right "to indorse and negotiate notes, and these laws would be binding on "the corporation. But it cannot be necessary to extend these illustra-"tions. The Legislature cannot be deprived of the power it holds for "the public good by any doubtful construction or remote inference."

"The position that the Legislature has granted away any of its "appropriate powers of legislation can be supported only by clearly "showing such grant. In the present case, there appears to be nothing "in the charter of the Provident Institution for Savings in Boston to "exempt it from the provisions of the general laws, passed since the "date of the charter, relating to savings banks, prescribing the mode of "investments; and the undersigned are therefore of opinion that that "institution is subject to those provisions of those general laws."

In re Provident Institution for Savings 9 *Cush.*, 604, 611. This opinion was signed by Chief Justice SHAW and Justices DEWEY, METCALF, FLETCHER, BIGELOW and CUSHING.

"The principle there laid down (*Dartmouth College Case*) and since "maintained in the cases which have followed and been controlled by "it, has no application where the statute in question is a *public law* "relating to a *public subject* within the domain of the general legislative "power of the State, and involving the *public rights* and *public welfare* "of the entire community affected by it. The two classes of cases are "separated by a broad line of demarcation."

Newton vs. *Commissioner*, 100 *U. S.*, 548, 557.

Morawetz on Private Corporations, Ed. 1886, states:

SECTION 1062. "That corporations are subject to the law making "power of the State, to the same extent as unincorporated individuals is "obvious. When the Legislature of a State grants to a number of per-"sons the right of forming a corporate association, it clearly does not "intend to emancipate them forever after from the law making power of "the State in respect of their corporate acts and rights; nor would the Leg-"islature have the power to do this. The legislative powers of the States "themselves are unrestrained, except by the limitations contained in the "Constitution of the United States."

SECTION 1065. "The power to make laws for the welfare and "safety of the community is essential to the existence of every State; "and hence it cannot be supposed that it was the intention of the several "States to limit this power by assenting to the Federal Constitution. "Police laws for the protection of the community from nuisance and "dangers, and regulations for the proper administration of public "affairs and the easy attainment of justice, have universally been held "valid, all ordinary contracts are subject to these general legislative "powers of the States; and no other rule is applicable to the contracts "by which a private corporation is formed."

SECTION 1067. "It is clearly a part of the legislative duties of every "government to pass laws for the protection of life and property within "its jurisdiction. General laws passed in good faith for such a purpose "are an exercise of the police power of the State, and do not impair the "obligation of existing contracts. Thus, a State may require railroad "companies, whether incorporated or not, to fence their tracts properly "and maintain cattle guards, and to construct viaducts at crossings."

In *Hare's American Constitutional Law, page* 609, *et seq.*, it is said:

"The rule that a government cannot be debarred from exercising "its authority for the ends for which government is instituted applies "with peculiar force to the police power. This power may be defined "as the right and duty of guarding against or forbidding all things that "are hurtful to society as an organic whole, or to the individuals of "which it is composed; and conversely of authorizing every act which "is requisite for carrying such regulations into effect. That such a power "exists, and may be exercised over individuals, is not seriously ques-"tioned, and the recent cases have established that it is not less appli-"cable to bodies corporate.

"The incorporation of a company for a specific purpose, as for "instance, the prosecution of a trade or business, confers the rights "which natural persons have for the same purpose, but confers no more; "and the company must submit to any regulation which would be con-"stitutional if made with regard to individuals."

Judge COOLEY says:

"The occasions to consider this subject (Obligation of Contracts) "in its bearings upon the clause of the Constitution of the United States "which forbids the States passing any laws impairing the obligation of "contracts have been frequent and varied, and it has been held, without "dissent, that this clause does not so far remove from State control the "rights and properties which depend for their existence or enforcement "upon contracts, as to relieve them from the operation of such general "regulations for the good government of the State and the protection "of the rights of indivinuals as may be deemed important. All con-"tracts and all rights it is declared, are subject to this power, and not "only may regulations which affect them be established by the State, "but all such regulations must be subject to change from time to time, "as the general well-being of the community may require, or as the "circumstances may change, or as experience may demonstrate the "necessity."

Cooley's Const. Lim., *574, 4 *Ed.*, 716.

REDFIELD, C. J.: "A question of importance, and often of consid-
"erable difficulty is made in this case ; whether, and to what extent, it
"is competent for the Legislature, by general laws, to impose upon rail-
"roads new and additional burdens not contained in their charters after
"they have gone into operation. The charter of this company requires
"them, in general terms, to fence their road upon both sides where a
"fence may be requisite for the owners or occupants of the adjacent
"places, and to make suitable and safe farm crossings. The general
"Railroad Act of 1850 requires all roads in the State, in addition to
"fencing and making farm crossings, to construct and maintain cattle
"guards at all farm and road crossings, suitable and sufficient to prevent
"cattle and animals from getting on the railroad. * * * It is cer-
"tain, we think, that the Legislature cannot impose new burdens upon
"corporations, under such circumstances, which are merely and exclu-
"sively of private interest and concern, and which have nothing to do
"with the general security, quiet and good order. But there can be no
"doubt they have the same right of general legislation over these cor-
"porations which they have over natural persons. By general laws,
"they may require them to conform to such regulations of a police char-
"acter as they may deem for the security of the rights of the citizens
"generally and most conducive to quiet and good order, and the security
"of property, and even the life of animals."

Nelson vs. *The Vermont and Canada Railroad Co.*, 26 *Vt. Rep.*, 718.

ADDIS, J.

"The power of the legislature to pass all laws required by the public
"welfare, and to subject corporations like natural persons to their opera-
"tion is unquestionable. This power is sometimes called the police
"power of the States. The right and duty of the Legislature to exercise
"it, and its extent and application have recently been so fully considered
"and vindicated in the case of *Thorpe* vs. *The Rutland and Burlington*
"*Railroad Company*, 27 *Vt.*, *140*, that it is needless to discuss the subject
"at this time. It is sufficient to say that laws required by the public
"good are constitutional, though they may impose new obligations and
"restrictions, and may materially increase the expenses and diminish
"the profits of corporations; *27 Vt. 140; 8 Barbour, 358. 390; Redfield*
"*on Railways, p. 537.* The object of such laws is the public welfare.
"Their effects upon the pecuniary interests of corporations are merely
"incidental, and do not give character to them, or determine their
"validity."

Branin vs. *The Conn. & Pas. Riv. Rd. Co.*, *31 Vt.*, *222.*

See also

Thorpe vs. *Rutland & B. Rd. Co., 27 Vt., 140.*

Frankford Ry. Co. vs. *The City, 58 Penna. St., 119.*

Balt. & Ohio Rd. Co. vs. *Goodwin, 10 How., 395, 400.*

Police power extends to persons and property and cannot be abridged even by legislation.

Beer Co. vs. *Massachusetts, 87 U. S. Rep., 32.*

A State may at any time alter the laws regulating procedure and provide new remedies for the ascertainment of justice.

Railroad Co. vs. *Hecht, 95 U. S. Rep., 170.*

We have seen that the charter of the plaintiff-in-error authorizes the location and construction of a railroad, and provides for recovering damages when the company "enter upon, use or take away" the property of the citizen, and that there is no provision that the company shall be exempt from consequential damages, and that such exemption arose by reason of the construction placed upon the constitutional provision by the rulings of the Supreme Court.

Now, then let us suppose that the Supreme Court of Pennsylvania had seen fit to overrule the *Phil. & Trenton Rd. Co.* case and kindred cases, and adopt the rule laid down by Chancellor Kent in *Gardner* vs. *Newburgh, 2 Johnson's Ch., 162,* and by this Court in *Pumpelly* vs. *The Green Bay Co., 13 Wall, 166,* could it have been successfuly contended that such overruling impaired the obligation of contract contained in the charter of the plaintiff-in-error? When, where and how did the Commonwealth of Pennsylvania contract with the Pennsylvania Railroad Company that the Supreme Court of the State would always rule this question in the same way? What was to prevent the Supreme Court of Pennsylvania at any time from adopting as its own the dissenting opinion of

Mr. Justice HUSTON in *Monongahela Nav. Co.* vs. *Coons, 6 W. & S. 115?* Law reports are filled with cases in which the rejected dissent has become the foundation of a better and wiser rule.

In *Plumpelly* vs. *The Green Bay Co. supra*, Mr. Justice MILLER delivering the opinion of this Court, says (page 177:)

"It would be a very curious and unsatisfactory result if in construing a "provision of constitutional law, always understood to have been adopted "for protection and security to the rights of the individual as against "the government, and which has received the commendation of jurists. "statesmen and commentators as placing the just principles of the com- "mon law on that subject *beyond the power of ordinary legislation to "change or control them*, it shall be held that, if the government refrains "from the absolute conversion of real property to the uses of the public, "it can destroy its value entirely, can inflict irreparable and permanent "injury to any extent; can, in effect subject it to total destruction without "making any compensation, because, in the narrowest sense of that "word, it is not *taken* for the public use. Such a construction would "pervert the constitutional provisions into a restriction upon the rights "of the citizen, as those rights stood at common law, instead of the "government, and make it an authority for invasion of private right "under the pretext of public good, which had no warrant in the laws or "practices of our ancestors."

If the view of this Court is the correct one then the Supreme Court of Pennsylvania in overruling its previous decisions would be only correcting an error that had already existed too long. To hold that such a correction of the general law impaired the obligation of a contract would be, therefore, it seems to us a *reductio ad absurdum.*

If the Supreme Court might change its ruling without impairing the obligation of contract, then why could not the same result be accomplished by legislation, organic or otherwise? Let us suppose, for the sake of argument, that there were no constitutional restrictions on the exercise of the power of eminent domain in force at the time of the incorporation of the plaintiff-in-error and that it possessed by grant the Commonwealth's privilege of taking private property for public use (without now discussing whether or not equity would

restrain the exercise of such privilege as being in violation of the common law right of the individual) and subsequent to such incorporation a law had been passed declaring that compensation should be made for private property taken for public use, would there be the slightest difficulty in sustaining the individual's right to compensation for property taken *after* the passage of the law? Would not such law be held to be but the giving of a remedy for previous unredressed wrongs? Indeed we think the argument could be properly carried to the extent of holding that in the absence of constitutional restrictions and declarations of right that there can be no taking without the correlative of compensation. The constitutional restrictions were not intended as a restraint on the rights of the citizen, but rather as a restraint upon the exercise of governmental powers. The individual's right of property is older and quite as sacred as a constitutional restriction or a charter of incorporation. If we are right that property *taken*, even in its narrow and restricted sense, should be compensated for, then why should not property "injured" be entitled to the same protection? The right to compensation for property "injured" through the exercise of the power of eminent domain rests on precisely the same foundation as for property "taken." It is clearly as much a wrong to injure one's property until its value is destroyed, as it is to take it absolutely. The difference in effect is only one of *degree*. For the depreciation in value, the result of consequential injuries, is a taking *pro tanto* from the owner.

Because the Commonwealth cannot be sued is no reason why the individual should not be entitled to compensation for injury done by the Commonwealth or its agents to his property. He *is* entitled to compensation, but there may be no forum in which he can enforce his rights. But is this a reason for holding that the Commonwealth, the sovereign, may not of its own will provide a forum in which it may be sued?

The Constitution of 1790 says:

"Suits may be brought against the Commonwealth in such manner, "in such Courts, and *in such cases* as the Legislature may by law direct."

This provision has remained in force continuously until this day. The Constitution of 1874 says that delegates of the State's power of eminent domain shall make compensation, not only for property *taken*, but likewise for property injured before such taking or injury or secure it to be made.

"We may therefore believe that compensation is a correlative, with-
"out which the right to take property for public use would be tatamount
"to confiscation and would consequently be due if there were no con-
"stitutional guaranties. For as eminent domain is, as we have seen
"simply a right to compel the citizen to sell at a price ascertained
"according to some just method of computation, the obligation of the
"government to pay is not less clear than that of the owner to surrender.
"Compensation has accordingly gone hand-in-hand with the right of
"taking property for public purposes in all civilized countries, and been
"regarded as essential to its legitimate exercise, even under despotic
"rule."

Hare's Am. Const. Law, 347.

Wilkinson vs. *Leland*, 2 *Peters*, 657.

A statute giving remedy in damages for injuries resulting from negligence causing death has not a common law liability to support it as injuries to property have, yet such statutes have uniformly been held constitutional. The theory of compensation for death is that the persons dependent are entitled to a support and maintenance of which they have been deprived and the measure of damage is the money value of the life destroyed. It therefore follows that, if the Legislature can lawfully give a remedy for the pecuniary loss which the widow and children sustain in the death of the husband and father, and "impose" that liability on a corporation *that previously had held its franchises exempt therefrom* it can *a fortiori*, give a remedy for property "injured."

"Statutes which have recently become common, and which give an
"action to the representatives of persons killed by the wrongful act,
"neglect or default of another, may unquestionably be made applicable
"to corporations previously chartered, and may be sustained as only

"giving a remedy for a wrong for which the common law had failed to "make provision."

Cooley's Const. Lim., *581, *p.* 724.

In *B. C. & M. R. R.* vs. *State*, 32 *N. H.*, 215, the original proceeding was an indictment against the plaintiff-in-error founded on an act in amendment of the laws relating to railroads, passed June, 1850, subsequently to the charter granted to the said plaintiff. Judgment was entered by default for want of an appearance and a fine of $1,800 was imposed, as provided by the Act.

BELL, J. "The first question raised upon the plea in this case "which is in its nature merely a demurrer, is as to the constitutionality "of the Statute upon which this indictment is founded. Assuming that "by its true construction it subjects the plaintiffs-in-error to indictment, "as the State contend, it is said that it subjects the defendants to addi-"tional and onerous liabilities, and is, therefore, an infringement of their "vested rights. It is asserted that the legislature have no power to "infringe either the expressed or implied privileges of a corporation, "and this principle in the abstract we are inclined to admit. If this "case falls within it, it is governed by it. But we think this principle can-"not be construed to limit the general powers of legislation, where such "legislation merely regulates the existing rights and duties of corpora-"tions, or provides new modes of enforcing acknowledged obligations. "This statute provides a new mode of enforcing the admitted duty of "these bodies to conduct their business with such care and prudence as "not to endanger the lives and limbs of those whom they undertake to "transport, and their obligations to compensate those who suffer by their "failure to perform their duty, for the damages sustained. It was never "a right of these corporations to conduct their business so carelessly as "to destroy the lives of their customers, either by an express or implied "grant. Their general liability to answer civilly in such cases is beyond "question; and the principle of law, which prevented any redress in "personal wrongs in case of the death of either party was an absurd "provision of a barbarous age, which had ceased to exist here in all "cases where an action was commenced in the lives of the parties."

The S. W. Railroad vs. *Paulk*, 24 *Ga.*, 363, was an action for damages for having destroyed the life of Paulk.

LUMPKIN, J.: "As to the constitutional competency of the Legisla-"ture to pass such an act, there cannot be a shadow of doubt; neither

"a corporation or a citizen can have a vested right to do wrong, to take "human life intentionally or negligently. * * * When subscriptions "were made to the stock of this road it must be presumed to have been "done with a full knowledge that the Legislature had this power."

The Act of Assembly in Pennsylvania, giving a right of action for injuries resulting in death was not passed until 1851, *five years after the plaintiff-in-error was incorporated.* Yet in hundreds of such cases has it been held responsible. The "price" of its franchise of operating its railroad has been "surcharged" with the additional cost of compensation to widows and children injured by the death of the husband and father.

In *Duncan* vs. *The Penna. Pd. Co.*, 94 *Penna. St. Rep.*, 435, the Court said (page 443):

"The Constitution of the United States undoubtedly precludes a "State from impairing the obligation of a charter even through an "amendment of its organic law; but this restriction has never been "held to forbid such remedial legislation as may be requisite to give "effect to antecedent rights or provide a remedy for injuries that previously "went unredressed. A child was entitled to support from his father at "common law, but he could not recover damages for the frustration of this "right through the parent's death from injuries occasioned by the negli- "gence of an individual or a body corporate. The Act which now "affords a remedy for such deprivations, and under which damages are "constantly assessed and judgments rendered, is of recent origin, and "was passed since the creation of the Pennsylvania Railroad Company, "and yet it has never, that I am aware of, been contended that it was "invalid as to pre-existing corporations or impaired their chartered "privileges."

"In like manner the citizen has a natural right to compensation for "the consequences of acts done for the public benefit that are injurious "to his estate or person, and a statute which affords a remedy cannot "justly be assailed as unconstitutional. Such an argument would "obviously be fallacious if advanced on behalf of an individual, and "the principle is the same when the defendant is a corporation. A power "conferred by a charter cannot be abrogated without impairing the "obligation of the contract; *but the Legislature does not, in making such "a grant contract that persons who are injuriously affected by the exercise "of the power are not entitled to indemnity*, nor that it will not provide a "means for rendering their demand effectual. This may be tested by

"supposing the incorporation of a railway company in a State where, as "was long the case in Rhode Island, there is no constitutional restraint "on the right of eminent domain and the subsequent enactment of a "law, providing that land should not be taken for the use of the road "without payment. Would any one contend that such a statute impaired "vested rights, or was within the prohibition of the Constitution of the "United States?"

"If the question must be answered in the negative, the Legislature "might obviously proceed to give a remedy for property injured or "destroyed."

See also *Hare's American Const. Law*, 421.

Patent vs. *Phila. & Read. R. R. Co.* Opinion by THAYER, P. J., appendix.

As to all property acquired by the plaintiff-in-error under the exercise of its power of eminent domain *prior to the adoption of the Constitution we would not interfere with it in the least;* but when it voluntarily exercises this power *since* the adoption of the Constitution and invades the rights of property guaranteed to the indivual he is entitled to compensation for the damages sustained in accordance with the legal remedies in existence at the time of the invasion of his right.

The right of property in the individual is at least as sacred as the charter of the plaintiff-in-error. In *Long's Appeal*, 87 *Penna. St. Rep., Norris*, 117, the Court say:

"This right of the natural person is quite as important and sacred "as that of the artificial person."

We think a broad and well-defined distinction exists between rights and liabilities of property already acquired by the plaintiff-in-error under its power of eminent domain, and its rights and liabilities as to property acquired or sought to be acquired by it since the adoption of the Constitution. While it may not be competent for the Legislature to impose greater liabilities on the plaintiff-in-error in regard to the property it has acquired, nor to deprive it of its power of eminent domain, yet the subsequent exercise of that power may be a proper subject of legislative enactment.

The plaintiff asserts that it has the right to build branch railroads to any point in any county into or through which its main line passes, occupying, without the consent of the municipality, the most crowded and populous highways, and *without liability* for the untold injury and damage it would thereby do: that the Commonwealth is powerless to protect its citizens from such action as the Board of Directors of the corporation plaintiff may deem for their best interests. Surely claims, so far reaching in their results and so contrary to reason and natural justice, should be founded on principles that do not admit of the slightest cavil or doubt.

(*b*) EXEMPTION FROM FUTURE GENERAL LEGISLATION CAN NEVER BE IMPLIED; THERE MUST BE AN EXPRESS CONTRACT.

"When a charter of a railway company or the grant of a franchise "in any other form, admits of a reasonable doubt, it will be solved in "favor of the public and against the grantees who will take nothing that "is not given expressly or by an implication equally plain with words. "The State will never, therefore, be presumed to have parted with any "of its prerogatives or franchises if the instrument can be differently "interpreted without doing violence to the words considered severally "and as a whole."

Hare's Amer. Const. Law, 661.

"Neither the right of taxation nor any other sovereign power will "be held to have been relinquished unless the intention is expressed in "terms too plain to be mistaken. Such contracts are to be rigidly scru-"tinized and never allowed to extend farther in scope or duration than "the terms clearly require; and if a doubt arises it must solved in favor "of the State."

Hare's Amer. Const. Law, 663, *et seq.*

"The rules of interpretation touching such contracts are well settled "in this Court. In *Tucker* vs. *Fergusson*, 22 *Wall*, 527, we said: 'But "the contract must be shown to exist. There is no presumption in its "favor. Every reasonable doubt should be resolved against it. Where "it exists it is to be rigidly scrutinized and never permitted to extend "*either in scope or duration* beyond what the terms of the concession "clearly require.' There must have been a deliberate intention clearly "manifested on the part of the State to grant what is claimed. Such a

"purpose cannot be inferred from equivocal language (*Providence Bank* "vs. *Billings*, 4 *Pet.*, 514; *Gilman* vs. *City of Sheboygan*, 2 *Black*, 510). "It must not be a mere gratuity. There must be a sufficient considera- "tion, or no matter how long the alleged right has been enjoyed it may "be resumed by the State at its pleasure. *Christ Church* vs. *Philadel- "phia*, 24 *How.*, 300. No grant can be raised by mere inference or pre- "sumption, and the right granted must be clearly defined. *Charles* "*River Bridge* vs. *Warren Bridge*, 11 *Pet.*, 420. The rule of construc- "tion in this class of cases is that it shall be most strongly against "the corporation. Every reasonable doubt is to be resolved adversely. "Nothing is to be taken as conceded but what is given in unmistakable "terms or by an implication equally clear. The affirmative must be "shown. Silence is negation and doubt is fatal to the claim. This "doctrine is vital to the public welfare. It is axiomatic in the jurispru- "dence of this Court." *Fertilizing Co.* vs. *Hyde Park*, 97 *U. S.*, 659.

Newton vs. *Commissioners*, 100 *U. S.*, 548, 561.

In the face of these authorities and of many others to the same effect, to cite which would be an affectation of industry rather than of learning, the plaintiff-in-error contends that there is an *implied contract* in its charter that the State will not compel it to make compensation for property "injured or destroyed" by the exercise of its privilege of taking private property for public use; that the State has *impliedly* sold its right to legislate for the common welfare of the community and provide remedies for the redress of grievances. To sustain this proposition its counsel cite *Fisk* vs. *Jefferson Police Jury*, *116 U. S.*, *132*, which rules that *implied contracts* are as much within the inhibition of the Constitution against impairing the obligation thereof as *express contracts*. Who doubts it? We contend there is no such contract as is alleged. And this Court has said over and over again that an *implied* restriction on a State's control of the essential attributes of sovereignty cannot exist.

II. The privilege of taking private property for public use is such an element of sovereignty that it cannot be granted so as to preclude future legislative control of its subsequent exercise.

We have seen under the first head of our argument that charters of incorporations are subject to the general law of the State and to changes made therein, that exemption from future general legislation can never be implied, and that there was no contract to exempt in this case.

We do not intend by the above proposition to affirm that a State by the use of apt words for a sufficient consideration may not contract to exempt a corporation or an individual from taxation. It is not necessary for us to discuss this much mooted question. It is not in this case. The privilege of taking private property for public use is a governmental power as incapable of alienation as the police power or the judicial or executive functions. We contend that the Legislature has the inalienable right to define the terms upon which the individual can be *deprived of his property* for a public use. That it is competent for one Legislature to give a remedy for property *taken* in its literal sense, and for all property *taken* while that is the definition of liability no greater liability can be imposed; but it is equally competent for any subsequent Legislature to give a remedy not only for property taken, but likewise for property "injured or destroyed" and that for property "taken, injured and destroyed" after this new definition of liability has gone into force, compensation is to be made just as before it had been "made for property taken."

If the constitutional provision, under which we claim, deprived the plaintiff-in-error, without compensation, of its power of eminent domain, or imposed greater burdens on its acquired property, there would be cause of complaint, but it does neither. It says to the plaintiff that when it exercises the privilege of taking private property for public use in the future it must do so subject to the individual's right to receive compensation not only for property *taken*, but also for property *injured or destroyed.* If of its own volition is sees fit to invade the rights of property of others it does so subject to the liability to make such compensation as the law provides a remedy for, at the time of the invasion. To hold otherwise is to hold that one citizen shall be entitled to one measure of

compensation and another to a different measure; that the one shall contribute his property for the public benefit without compensation and the other shall receive compensation, just as the agent of the State, invested with the power of eminent domain, happens to have been incorporated prior or subsequent to the adoption of the Constitution, that is, if the position of the plaintiff-in-error is correct when it builds a new railroad, the citizen's right to compensation extends only to property *taken* in the literal sense; but when a railroad company, incorporated since the adoption of the Constitution, builds its railroad, the same citizen is entitled to compensation not only for the property *taken*, but likewise for property *injured or destroyed.* A general law applicable to some citizens and not to others, although the damage in both cases is equally grievous and equally entitled to compensation.

Judge COOLEY, *Const. Lim.*, 524, defines eminent domain to be

"the rightful authority, which exists in every sovereignty, to control and "regulate those rights of a public nature, which pertain to its citizens in "common, and to appropriate and control individual property for the "public benefit as the public safety, necessity, convenience or welfare "may demand."

"The right of eminent domain is that of taking property for public "use, and is called 'eminent' because it is vested in the State and may "supersede every private right or title."

"The use to which the proceeds are applied is presumably an "equivalent for the loss occasioned by taxation; but there is no room "for such an inference as regards the right of eminent domain, which is "accordingly attended with a moral, and under the organic law of the "United States a legal obligation to compensate the person who is "deprived of his property for the general good."

Hare's Amer. Const. Law, 331, 332.

"Taxation exacts money or services from individuals as and for "their respective shares of contribution to any public burden. Private "property taken for public use by right of eminent domain is taken, not "as the owner's share of contribution to a public burden, but as so "much beyond his share. Special compensation is therefore to be made "in the latter case, because the government is a debtor for the property

"so taken; but not in the former, because the payment of taxes is a "duty and creates no obligation to repay, otherwise than in the proper "application of the tax. Taxation operates upon a community, or upon "a class of persons in a community, and by some rule of apportion- "ment. The exercise of the right of eminent domain operates upon an "individual and without reference to the amount or value exacted from "any other individual or class of individuals."

People vs. *Brooklyn*, 4 *Comstock*, 419, 424.

"Whatever the rule may be as regards taxation, *the power to pro-* "*vide for the administration of justice is not merely governmental but* "*one which should be uutrammelled*, in view of the end for which it is "conferred; and a citizen who obtains a statutory grant which is at "variance with this principle must be presumed to know that it is invalid "and may be set aside."

Hare's Amer. Const. Law, 621.

The foregoing principles have peculiar force in this case, owing to the construction which the Supreme Court of Pennsylvania prior to the purchase of the Main Line of Public works by the Pennsylvania Railroad Company put upon the Act of 16th of May, 1857, under which the plaintiff-in-error obtained its title to the Philadelphia and Columbia Railroad. The case is reported under the name of *Mott* vs. *Penna. Rd. Co.*, 6 *Casey*, 9. It is there ruled that

"The Legislature has no power to alienate any of the rights of "sovereignty such as that of taxation, so as to bind future legislatures; "and any contract to that effect is void."

And that

"The rights of sovereignty are a trust to be exercised for the benefit "of the people, as occasion may require; not to be abandoned or "bargained away at the discretion of their agents."

Chief Justice LEWIS, in delivering the judgment in the above case, says (page 27):

"If one portion of the legislative power may be sold another may "be disposed of in the same way. If the power to raise revenue may be "sold to-day, the power to punish for crimes may be sold to-morrow,

"*and the power to pass laws for the redress of civil rights may be sold the* "*next day*. If the legislative power may be sold, the executive and "judicial powers may be put in the market with equal propriety. The "result to which the principle must inevitably lead proves that the sale "of any portion of governmental power is utterly inconsistent with the "nature of our free institutions, and totally at variance with the object "and general provisions of the Constitution of the State."

Again, on page 30, after citing *Brewster* vs. *Hough*, 10 *N. H.*, 138, in which it was held that "the power of taxation is essentially a power of sovereignty or eminent domain'" he then proceeds:

"Chief Justice PARKER in delivering the opinion of the Court, ques- "tions the power of the Legislature to make a contract by which it shall "be surrendered without express authority for that purpose in the Con- "stitution. He held that there is a material difference between the right "of a Legislature to grant lands, or corporate powers or money and a "right to grant away the *essential attributes of sovereignty*. These he "adds, do not seem to furnish the subject matter of a contract. In these "views we fully concur."

The Court then made an order (page 41) restraining the State authorities from selling and this plaintiff-in-error from buying so as to be exempt from future taxation. Yet with this enunciation of the law of Pennsylvania being made in their own cause the plaintiff-in-error claims that it became the owner by purchase from the State of the power of eminent domain, so hampered and restrained that no subsequent law, organic or otherwise, could control their future exercise of it. In short, that the company purchased a license from the State to confiscate the property of its citizens, and that the State impliedly contracted that it never would give its citizens a remedy against such acts of piracy.

The Supreme Court of Pennsylvania held that the power of taxation was an inalienable governmental power *a fortiori*, the power of eminent domain is inalienable. We are not overlooking the rulings of this Court which hold that a contract to exempt from taxation is enforceable. The case of *Mott* vs. *Penna. Rd. Co.* shows that the Supreme Court of

Pennsylvania meant that that question should never be raised. We are only contending that under the law of Pennsylvania announced by its Supreme Court, not only the power of taxation, but also the power of taking private property for public use could not be granted so as to preclude future legislative action in reference thereto. This was the law of the land before the plaintiff-in-error purchased the main line of public works, a law written by a mandatory order of the Court into the contract of purchase.

III. By reason of the plaintiff-in-error having accepted additional privileges and amendments to its charter since the Act of May 3, 1855, and the amendments of the Constitution of Pennsylvania of 1857, it subjected its charter to the power of the Legislature to "alter the same" in such manner, however, that no injustice shall be done to the corporators; and imposing liability for consequential damages does no injustice to the corporators.

The plaintiff was incorporated April 13, 1846, with power to build a railroad from Harrisburg to Pittsburgh, and under the seventeenth section of the Act, with authority to build branch roads to any point in any county through which the main line passed. By Act of Assembly, approved 3d of May, 1855 (P. L. 423), it is enacted:

"Every charter of incorporation granted or to be granted, shall be "deemed and taken to be subject to the power of the Legislature, *unless* "*expressly waived therein* to alter, revoke or annul the same whenever, "in their opinion it may be injurious to the citizens of the Common- "wealth; in such manner, however, that no injustice shall be done to "the incorporators and *as fully as if the reservation of said power had* "*been therein expressed.*"

The Act authorizing the sale of the Main Line of Public Works, under which the plaintiff obtained title, to the Philadelphia and Columbia Railroad was approved May 16, 1857, (P. L. 519), whereby it is enacted, Section 11:

"That should any company already incorporated by this Common-
"wealth become the purchaser of said main line, they shall possess,
"hold and use the same under the provisions of their Act of incorpora-
"tion, and any supplements thereto, modified however, so as to embrace
"all the privileges, restrictions and conditions granted by this Act, in
"addition thereto.

SECTION 15.—"*That the purchaser of said work shall have a per-*
"*petual corporate succession*, and if the said purchaser shall at any time
"*misuse or abuse* any of the privileges granted by this Act, the Legisla-
"ture may *revoke all* and singular the rights and privileges granted to
"said company, on a judicial decree of said misuse or abuse, being first
"duly had and obtained, and thereupon may take for public use the road
"or roads, canal or canals so purchased or constructed in pursuance of
"this Act; provided, that in *resuming* such franchises no injury shall be
"done to the corporators of said company; and in *taking* such road or
"roads, canal or canals for public use, full compensation shall be made
"to the stockholders."

This last mentioned Act of Assembly was duly accepted by the stockholders of the said corporation plaintiff, at a duly convened meeting held for that purpose, July 20, 23, 1857. The deed-poll from the Commonwealth to the defendant for the Main Line of Public Works, is dated July 31, 1857. (Record, page 143.)

The fourth amendment to the Constitution, ratified at an election held in October, 1857, is as follows: Article I. Section 26.

"The Legislature shall have the power to alter, revoke or annul
"any charter of incorporation hereafter conferred by, or under any
"special or general law whenever, in their opinion, it may be injurious
"to the citizens of the Commonwealth, in such manner, however, that no
"injustice shall be done to the corporators."

Since the adoption of this amendment the plaintiff has accepted several amendments to its charter, notably, the Act of 4th of April, 1868 (P. L. 59.)

This Act limits the amount of recovery in cases of negligence resulting in death to five thousand dollars, and was accepted by the plaintiff-in-error, April 15, 1868, and has been held to be a part of its charter by the Supreme Court of

Pennsylvania in *Penna. R. R. Co.* vs. *Langdon*, 92 *Penna. St. Rep.*, 21.

In the current case (111 *Penna. State Reports, page* 361, *Record, page* 116), GORDON, J., delivering the opinion of the Court, says:

> "Whence, then, did the Pennsylvania Railroad Company derive its "authority to build a branch from the western side of the Schuylkill to "Fifteenth Street? Certainly not from the Act of 1846, for that act gave "it the charter which embraced only the power to build and operate a "road from Harrisburg to Pittsburgh, but rather, as the counsel for the "defendant below contends, from the Act of 15th of May, 1857. This "act, *inter alia*, reads as follows: 'That any company already incor-"porated by this Commonwealth, becoming a purchaser of said main "line, shall possess, hold and use the same under the provisions of their "act of incorporation, and any supplement thereto, modified, however, "so as to embrace all the privileges, restrictions and conditions granted "by this act in addition thereto.' This gave the Pennsylvania Company "a new charter, containing all the privileges of that of 1846, and it was "under the rights thus conferred, that it built and now operates the "branch in question."

In this connection it is also to be noted that Section 15 of the same Act, provides, "That the purchaser of said works shall have a perpetual corporate succession."

It is manifest therefore that so far as the Philadelphia and Columbia Railroad is concerned a new charter was granted to the plaintiff-in-error to operate and use the same under the powers of their original act of incorporation.

The Act of the 3d of May, 1855, *supra*, was in force at the time this purchase was made, and the act authorizing the sale of the main line of public works was therefore accepted, subject to this general law, which authorized the Legislature to "alter, revoke or annul" a charter thereby granted whenever in their opinion it may be injurious to the citizens of the Commonwealth, in such manner, however, that no injustice shall be done to the corporators," *and as fully as if the reservation of said power had been therein expressed.*"

The Act of 1855 was supplied by the fourth amendment of 1857 to the Constitution. It was therefore competent for

the Legislature and *a fortiori* for the Constitution to impose upon the plaintiffs the liability for consequential damages, provided that in so doing "no injustice was done to the corporators."

Imposing by act of Legislature upon a corporation, which holds its charter subject to the right to "*alter, revoke or annul*" the same, liability for consequential damages, does no injustice to the corporators.

Monongahela Navigation Company vs. *Coons*, 6 *Penna. St. Rep.*, 379.

On this point this case would appear to be conclusive. The Monongahela Navigation Company was incorporated in 1836, without liability for consequential damages as was held in a case between the same parties. (6 *W. & S.*, 101.) Subsequently (1839) its charter was amended, additional privileges granted, and the last section (P. L. 1839, 456) reserved to the legislature "*the right to alter, amend or annul the charter of said company at any time hereafter, in such manner, however, that no injustice shall be done to the incorporators.*" In 1844 (P. L., 390) the Legislature passed a declaratory act in which it is enacted that the Navigation Company "shall make amends for any damage done, or that may be done, to lands or property lying upon the Monongahela River or its branches and tributary streams, by overflowing the same." GIBSON, C. J. in delivering the opinion of the Court, says:

"It is evident that by accepting additional privileges and powers on "the terms prescribed in the grant of them, the company surrendered "the inviolability of its contract to the discretion of the Legislature, how "this discretion has been exercised it is not for us to say, but if we were "bound to do so, we would promptly say that it has, in the words of the "declaratory act, done no injustice to the company."

The Supreme Court of Pennsylvania rely on *Monongahela Navigation Company* vs. *Coons*, in ruling the current case and the applicability of the one case to the other is clearly shown in the opinion of the Court. (Record page, 117). the Court say:

"But if the defendant's charter dates from 1857, it would seem to "be clear that it was taken subject to the Act of May 3, 1855, if not to "the amendment of 1857, and, if so, that Act must be taken as part of "the charter. 'Every charter of incorporation,' says the Statute, granted "or to be granted, shall be deemed and taken to be subject to the power "of the Legislature, unless expressly waived therein, to alter, revoke or "annul the same whenever in their opinion it may be injurious to the "citizens of the Commonwealth; in such manner, however, that no "injustice shall be done to the corporators and as fully as if the reserva- "tion of said power had been therein expressed."

"That under this Act the Legislature has the power to alter all "charters granted subsequently to its passage, there can be no doubt, "and no reason has been given why the charter of the defendant should "be exempted from its provisions. The allegation that it was so ex- "empted by reason of its purchase of the Main Line of the Public "Works cannot be sustained, for we find nothing of the kind in the Act "relative to the sale of those works. By that purchase it got, in addi- "tion to its right to hold and operate the Main Line of the State improve- "ment, what was the equivalent to a new charter, by which powers not "conferred by the sale itself were vested in it and surely it took those "powers subject to the Act of 1855."

"The conclusion here stated cannot be avoided, but by showing "that the new grant was accompanied by an express renunciation of "Legislative jurisdiction. Nor must we pass unnoticed the fact that this "company accepted as part of its charter the Act of the 15th of April, "1868, and so became subject to the Constitutional amendment of 1857, "and, as a consequence, to the legislative power of the General Assembly. "We thus find that the legal status of the Pennsylvania Company at "the time of the adoption of the Constitution of 1874 was in all respects "similar to that of the Monongahela Navigation Company, at the time "of the passage of the Act of 1844, so that we may regard the case of "that company against Coons, reported in *6th Barr*, 379, as decisive of "the controversy in hand. The corporation here mentioned was erected "in 1836 without the imposition of any conditions respecting such con- "sequential damages as might result from the construction of its works. "On the 24th June, 1839, a supplemental Act was passed by which "certain new privileges were granted to the company, and in the last "section of that Act, the Legislature reserved to itself the right 'to "alter, amend or annul the charter in such manner as to do no injustice "to the stockholders.' Now, we may pause here for the moment to "observe the similarity of the language thus used to that found in the "Act of 1855, and in the amendment of 1857, and to remark that this "reservation of legislative power is as well part of the defendants' "charter as it was that of the Monongahela Navigation Company.

"'Every charter of incorporation granted or to be granted shall be "deemed and taken subject to the power of the Legislature, unless ex- "pressly waived therein, as fully as if the reservation of said power had "been therein expressed.' The similarity of the position of the two "companies with reference to the subject matter under consideration is "thus rendered certain, and the decision which determines the liability "of the one must also, if adhered to, settle that of the other. In 1842, "Coon *et al* brought their suit for damages resulting to them from the "water backed by the defendants' dam on their mill-wheels, but the "Court refused to sustain this action for the reason that this *locum tenens* "of the State was not liable for damages of this character. So the "matter stood until 1844, when the General Assembly enacted 'That "the company shall make amends for any damages done or that may "be done to lands and property on the Monongahela River or its "branches or its tributary streams by overflowing the same.' Under "this Act the plaintiffs brought a new action for the same damages as "those claimed in the former suit, and it was held that they were entitled "to recover."

It was therefore the adjudicated law of Pennsylvania prior to the purchase by the plaintiff-in-error of the main line of public works, and of their acceptance of the Act of 1868, that wherever a corporation held its charter, subject to the Legislature's right to *alter, revoke or annul* the same, that it was competent to impose liability for consequential damages and that such imposition did no injustice to the corporators, and did not impair the obligation of contract.

This ruling emanated from the same source which the plaintiff claims entitles them to the privilege of taking private property for public use, without liability for consequential damages, namely, the Supreme Court of Pennsylvania. If the one is a property rule, so also is the other. If the one exempted it from liability for consequential damages, the other gave the right to impose such liability; and with the knowledge that such was the law of the land, it has accepted not only the Act of 1857, but also numerous other Acts approved since 1857.

The plaintiff-in-error, however, says that the Act of May 3, 1855, was repealed *pro hac vice* by the fifteenth section of the Main Line Sale Act of 1857. This we think cannot be

sustained. There is no express repeal, and if the repeal is to be by construction, it must be on the ground of repugnancy. A general law in force is a part of every charter subsequently granted, saving, of course, the right of the Legislature to direct otherwise, or, what is the same thing, a fair construction of the subsequent act should manifest an intent that it should not be subject to the general law. A reading of the fifteenth section of the Act of 1857, shows that the Legislature contemplated a different state of facts, which was to call in operation that clause, than what was contemplated under the Act of 1855.

The Act of 1857 provides for the revoking of the privileges granted, in case of *misuse or abuse;* and so far as the Act of 1855 authorizes the *revoking or annulment* of the charter the fifteenth section of the Act of 1857 would seem to supply its place, but there is no provision for those many minor changes in a charter which legislative discretion might deem neccessary for the protection of the Commonwealth, and yet not justify their *revocation or annulment* of the charter *e. g.* the imposing of liability for consequential damages, and this could be done only under the power "*to alter*" the charter of the plaintiff-in-error as conferred by the Act of 1855. We, therefore submit, that so far as the authority *to alter* a charter was concerned, there is no sufficient intent manifested in the Act of 1857 to operate as a repeal of that portion of the Act of 1855.

But how does the plaintiff-in-error benefit its case by showing that the Act of 1855 was repealed *pro hac vice* by the Act of 1857, because, for the purposes of this case, it subjected its charter under the *Navigation Company* against *Coons*, as fully to legislative discretion by the acceptance of the Act of 1868, as if the Legislature had reserved the right to "alter" expressly in the Act of 1857, since the Act of 1868 which it had accepted, undoubtedly had under all of the authorities, the constitutional amendment of 1857 written into it, and when it accepted the Act of 1868, it was aware that if the *Navigation Company* vs. *Coons*, was to be followed,

it gave to the Legislature the right to impose liability for consequential damages without impairing the obligation of contract.

By "legislative discretion" we do not mean to claim that it is a discretion that may be arbitrarily exercised without regard to the rights of property. The very languague of the reservation of the power precludes such a view. The legislature may not *alter, revoke or annul* the charter in such manner as shall do injustice to the corporators. It is beyond the scope of this argument to discuss whether or not some of the provisions of the Constitution may do injustice to the corporators, but must remain inoperative until the Legislature prescribes an adequate remedy for the compensation of the dissenting corporators. It is sufficient for our case to show that imposing a liability for consequential damages does no injustice to the corporators.

"Power to alter, revoke or annul any charter of incorporation was "vested in the Legislature by the Constitution more than a quarter of a "century before the defendant company was incorporated. Even when "the language of the charter is sufficient to amount to a contract, it was "twice admitted by Mr. Justice STORY, in *Trustees of Dartmouth College* "vs. *Woodward*, that alterations and amendments may be made in a "charter where the power for that purpose is reserved to the Legislature "in the act of incorporation. *4 Wheat., 518, 708, 712.* "Acts of "incorporation granted subsequently to the adoption of the Constitution, "must be construed as if the provision of the instrument in question "was embodied in the charter. * * * Tested by these considera-"tions, it is clear, even if it be admitted that the language of "the charter is sufficient to import a contract that the power of the "Legislature under the Constitution is amply sufficient to justify that "department of the State to pass the act raising the license for each car "from thirty to fifty dollars."

Railway Company vs. *Philadelphia, 101 U. S., 528, 539, 540.*

In *Tomlinson* vs. *Jessup, 82 U. S., 454,* Mr. Justice FIELD delivering the opinion of the Court, says:

(Page 457). "The Constitution of South Carolina, adopted in 1868, "declares that the property of corporations then existing, or thereafter "created, shall be subject to taxation, except in certain cases not material "to the present inquiry. The subsequent legislation of the State carried "out this requirement, and provided for the taxation of the property of "railroad companies; and the question presented is, whether the Act of "December 1855, to amend the charter of the North Eastern Railroad "Company, exempted the property of that company from such taxation.

"The company was incorporated in 1851, and at that time a general "law of the State was in existence, passed in 1841, which enacted that "the charter of every corporation, subsequently granted, and any "renewal, amendment or modification thereof, should be subject to "amendment, alteration, or repeal by legislative authority, unless the "act granting the charter or the renewal, amendment, or modifica-"tion, in express terms excepted it from the operation of that law. The "provisions of that law, therefore, constituted the condition upon which "every charter of the corporation subsequently granted was held, and "upon which every amendment or modification was made. They were "as operative, as much a part of the charter and amendment, as if "incorporated into them. * * * (Page 459). The reservation effects "the entire relation between the State and the corporation, and places "under legislative control all rights, privileges and immunities derived "by its charter directly from the State."

The case of *New Jersey* vs. *Yard*, *95 U. S.*, *104*, relied upon by the plaintiff-in-error as establishing that the Act of 1855 was not to be read into the Act of 1857, does not sustain their position. The language of the New Jersey act, by its terms was limited to charters of corporations granted *after* its passage, and on this ground was held inapplicable to the case under consideration. The language of the Act of 1855, says:

"Every charter of incorporation *granted or to be granted*, shall be "deemed and taken to be subject to the power of the Legislature, *unless* "*expressly waived therein to alter, revoke and annul, etc., and as fully* "*as if the reservation of said power had been therein expressed.*"

Such language is not open to construction, it is too plain to require construction, and it is manifest that the Legislature intended to write this act into every subsequent charter, and into all previous charters that it had a right to.

IV. By reason of the plaintiff-in-error having accepted the benefit of a general law passed since the adoption of the existing Constitution of Pennsylvania, it is within the provisions of Section 2, Article XVI of that instrument, and therefore, holds its charter subject to the provisions of the Constitution.

This proposition renders necessary the ascertainment of the power under which the plaintiff's elevated railroad was built on Filbert Street, in front of the property of the defendant-in-error. The plaintiff-in-error asserts that it is authorized to build its elevated railroad under either one or two powers, and has pleaded each power separately in justification of its action (Record, 10–12.)

First.—Under a grant to extend the Philadelphia and Columbia Railroad to the Delaware River in the city of Philadelphia, and

Second.—As a branch of the main line under the 17th Section of the Act of 1846, extended to the Philadelphia and Columbia Railroad by the 11th Section of the Act of 1857.

First.—Is it an extension of the Philadelphia and Columbia Railroad to the Delaware River in the city of Philadelphia to build a railroad to Fifteenth and Market Streets in that city? The plaintiff has answered this in the negative by the construction it has placed upon this power, because in the amendment to its charter of March 12, 1873 (*P. L.* 253) it speaks of the Delaware extension as a completed and constructed railroad. Section 1, of this Act is:

"That the Pennsylvania Railroad Company be and it is hereby "authorized to construct a double track railroad upon the westernmost "thirty feet of Delaware Avenue, in said city, as re-located between "Queen and Washington Streets, and as widened between the north "side of Dock Street and said Christian Street *with such connections* "*with its Delaware River Extension and turnouts* as may be neces- "sary."

It constructed a Delaware River Extension many years ago and it has continued to use and operate the same. Let us concede, however, for the purpose of the argument, that this power has not been exercised, and was available for the purpose of extending the railroad to the Delaware River. Can it be said that a railroad located as this one and terminating at Fifteenth and Market Streets is, in any fair sense, an extension to the Delaware River? The Act of 1857 speaks of the Delaware River as the *terminus ad quem*; when there is such a grant of power the law will not permit the grantee to construct a part only, and then stop. The plaintiff has built only to Fifteenth and Market Streets, where it has established its terminal station, at least a mile west of the Delaware River.

Stewart's Appeal, 56 *Penna. St., Rep.*, 413.
Cohen vs. *Williamson*, 1 *M., N. & G.*, 481.
Logan vs. *The Earl of Courtown*, *Bea.*, 22.
People vs. *Vermont R. R. Co.*, 24 *N. Y.*, 267.
Commonwealth vs. *Erie and N. E. R. R. Co.*, 27 *Penna. St. Rep.*, 339.

Second.—Is it a branch of the main line under the 17th Section of the Act of 1846, extended to the Philadelphia and Columbia Railroad, by the 11th Section of the Act of 1857?

It cannot be built as a branch of the main line, because (*a*) the branching power conferred by the Act of 1846, Section 17 (Record, page 132), applies only to "*either of the counties into or through which the said main line of their road may pass between Harrisburg or Pittsburgh.*"

(*b*) The grant is not in express words; nor does it arise by necessary implication.

(*c*) The franchise of making branch roads is severable.

The operative words of the 11th Section of the Act of 1857 are, that the purchaser of the main line of the public

works "*shall possess, hold and use* the same under the provisions of their act of incorporation." What was purchased was a completed railroad in operation, extending from a point on Market Street in the City of Philadelphia, 87 feet west of the Market Street bridge, over the Schuylkill River, to Columbia, on the Susquehanna River. That the plaintiff-in-error can "*possess, hold and use*" the Philadelphia and Columbia Railroad without the franchise of building branch roads, is too plain for argument. If the power exists at all it must be implied from the language of the 11th Section of the Act of 1857, when it says:

> "That should any company already incorporated by this Common-
> "wealth become the purchaser of said main line, they shall possess,
> "hold and use the same *under the provisions of their act of incorpora-*
> "*tion*, and any supplements thereto modified, however, so as to em-
> "brace all the privileges, restrictions and conditions granted by this
> "act in addition thereto."

It certainly was not necessary to the ownership of the Philadelphia and Columbia Railroad to possess the branching power conferred by this original act. This can be tested by noting that by the 11th Section of the Act of 1846, they are authorized to "extend said road or branch thereof to the town or harbor of Erie." Could it be successfully argued that by virtue of the 11th Section of the Act of 1857 the right to build a branch road to Erie, such branch could be started in the county of Philadelphia and extend across the State from the southeast to the northwest corner thereof.

Nothing is to be taken by implication as against the State; if you have the power, point to it in plain words, if you have to resort to construction, the power does not exist. A doubtful grant of a franchise does not exist, to raise a doubt is to resolve it in favor of the State.

Black vs. *Canal Company*, 9 *C. E. Green*, 476.
Stevens vs. *Railroad Company*, 5 *Vroom* 537.
Commonwealth vs. *Erie and N. E. Rd. Company*, 27 *Penna. St. Rep.*, 339.
Newton vs. *Commissioners*, 100 *U. S.*, 548, 561.

There is legislative authority, however, for the building of this railroad, and that is under the Act of June 9, 1874 (P. L. 282), in connection with the ordinance of Councils of the City of Philadelphia of October 13, 1879. The Act of 1874 authorizes

"the proper authorities of any city to enter into contracts with any of "the railroad companies whose roads enter their limits whereby the said "railroads may *relocate, change or elevate* their railroads within said "limits in such manner as in the judgment of said authorities may be "best adapted to secure the safety of lives and property, and promote "the interest of said city and for that purpose the said authorities shall "have power to do all such acts as may be necessary and proper to "effectually carry out such contracts."

The Ordinance of the Councils of the City of Philadelphia of the 13th of October, 1879 (Record, page 149), after authorizing the location of the elevated railroad, as it is now constructed longitudinally on Filbert Street, provides in Section 3:

"That the said Pennsylvania Railroad Company shall agree to keep "the said railroad and structure in good order and condition and to "save the City of Philadelphia harmless so far as the said city may be "liable therefore, from any responsibility or liability whatever, that "may grow out of the establishment of said railroad."

The Act of 1874 gives the power to "*relocate and elevate*" the railroad of the plaintiff-in-error in the City of Philadelphia. The ordinance of 1879 authorizes the location on which the road is built, with the agreement on the part of the plaintiff to indemnify the city from loss.

SECTION 10, Article XVII of the Constitution provides,

"No railroad company in existence at the time of the adoption of "this article, shall have the benefit of any future legislation by general "or special laws, except, on condiiion of complete acceptance of all the "provisions of this article."

SECTION 2, Article XVI of the Constitution provides that

"the General Assembly shall not remit the forfeiture of the charter of "of any corporation, now existing, or alter or amend the same or pass

"any other general or special law for the benefit of such corporation, "except upon the condition that such corporation shall thereafter hold "its charter subject to the provisions of this Constitution."

It necessarily results, therefore, that if the plaintiff in-error built its elevated railroad under the authority derived from the Act of 1874, through an agreement with the City of Philadelphia, evidenced by the Ordinance of October 13, 1879, it has accepted the benefit of a general law passed since the adoption of the Constitution, and therefore, holds its charter subject to the provisions of the Constitution.

The plaintiff asserts, however, that it derived no power or authority to build its road under the Act of 1874 in connection with the Ordinance of 1879, but that it had sufficient power to build the road without the consent of the city authorities.

Does it lie in the mouth of the plaintiff-in-error to say that it derived no authority from this Ordinance? The plaintiff-in-error says that it was a mere act of courtesy to the city authorities to ask their assent to their plan; that it had the power to build this railroad, elevated or otherwise, upon any of the streets in the city of Philadelphia, without the consent of the city authorities, and that, too, without liability to make compensation to property owners for the injury done to their property by such construction. We do not think that it has any such power. We contend that it cannot occupy any public highway, without the consent of the municipal authorities, or an express grant from the Legislature. It was essential to the plaintiff-in-error to obtain the consent of the city authorities to enter upon and occupy Filbert Street longitudinally. Even, if the road be built as an extension of the Philadelphia and Columbia Railroad or as a branch of the main line, it could not occupy the bed of Filbert Street without the consent of the city.

"The company has a right to appropriate a street only where the "authority has been given by the sovereign power of the State."

Comm. vs. *Erie and N. E. R. R. Co.*, 27 *Penna. St. Rep.*, 339.

"While the franchises of the corporation are property and may be "taken under the power of eminent domain, yet when property has "already been taken for one public use, it cannot be taken by another "corporation for another use, except by express grant or by necessary "implication."

"But no implication can arise in favor of the right of one corpora- "tion to take the franchise of another under the right of eminent domain, "unless arising from a necessity so absolute that without it the grant "itself would be defeated, not from a necessity created by the corpora- "tion for its own convenience or for the sake of economy."

Pittsburgh Junction Railroad's Company's Appeal, 122 *Penna. St. Rep.*, 511.

And to the same effect are:

Dillon on Municipal Cor., 560.
Springfield vs. *Railroad Company*, 4 *Cushing*, 63.
Boston and Albany Railroad Company Case, 53 *N. Y.*, 574.
Cake vs. *Railroad Company*, 87 *Penna. St. Rep.*, 307.
Cemetery Company vs. *New Haven*, 43 *Conn.*, 234.
Bridge Company vs. *Bridge Company*, 7 *N. H.*, 35.
Railroad Company vs. *Shields*, 307.
Central Railroad Company vs. *Pennsylvania Railroad Company*, *Amer. Law Review*, *February*, 1880, 136.

Conceding to the plaintiff the power it asserts to build the road, there is no defined location on which it is to be built and accordingly no express grant of the power to occupy any street. To reach the Delaware River there would be a grant by implication to cross intervening streets, but not to occupy any longitudinally. This right was obtained from the municipal authorities of the City of Philadelphia under the Ordinance of 1879, in connection with the Act of the 9th of June, 1874.

The Supreme Court of Pennsylvania hold that the power to build this road was derived from the Act of 1846, extended

by the Act of 1857, to the Philadelphia and Columbia Railroad. For the sake of the argument let us concede that this is the source of power under which this elevated railroad was built. There is nothing in the Act of 1846, that would authorize the occupancy of Filbert Street for railroad purposes, the right to do this was granted under the Ordinance of 1879, and the authority to pass that ordinance so as to take property already appropriated to public use is derived solely from the Act of 1874. It matters not, therefore, whether or not the authority to build this elevated railroad was derived from the branching powers of the Act of 1846 or from the right to extend the Philadelphia and Columbia Railroad to the Delaware River. Under either power the right to occupy Filbert Street was derived from the Ordinance of 1879, authorized by the Act of 1874, and in accepting the benefit of this Ordinance it accepted the benefit of a law passed since the adoption of the Constitution of 1874, and therefore holds "its charter subject to the provisions of this Constitution."

It is useless for the plaintiff in-error to contend that it derived no benefit from the Act of 1874, or the Ordinance of 1879, because we have shown their right to be on Filbert Street is by virtue of this law and this ordinance. If this position be well taken it is unnecessary to consider any other question in the cause. It has accepted the Constitution of 1874, and is bound by all its provisions.

The plaintiff-in-error, however, says that the Constitution of 1874 is not applicable to it, because all prior private corporations are excepted from the operation of that instrument, and its provisions cannot be made binding upon a corporation in existence prior to its adoption except by a duly passed resolution of its stockholders certified under its corporate seal, in accordance with the Act of Assembly directing the method. We submit that this is an inaccurate view of the Constitution. The exemption of corporations from the operation of the Constitution does not arise from anything in the Constitution itself, but only by reason of the prohibition in the Constitution of the United States forbidding

the passage of a law impairing the obligation of contracts. It is binding alike on the natural and the artificial person, but it may be inoperative on certain corporations by reason of their charters being prior contracts. It would be equally inoperative on the contracts of natural persons with each other, or with the Commonwealth. While some of its provisions may require legislative enactment to carry them into effect, such, however, cannot be said of the declaration of right, which secures an individual in the possession of his property against invasion under the power of taking private property for public use, without first making compensation for the damage sustained. Such a provision requires no Act of Assembly to enforce it. By its own strength it enforces itself. Nor is the argument more sound, that because the Legislature points out one method of accepting the Constitution, that that is the only method by which it can be shown. If this be true, then the corporation plaintiff could accept the benefits of general laws and yet hold its charter without the Constitution. Such a view would defeat the manifest purpose of the people to subject all incorporated companies to constitutional provisions, which could not be changed by venal legislators.

M. HAMPTON TODD,
DAVID T. WATSON,
GEORGE W. BIDDLE,
Of Counsel with Defendant-in-Error.

Appendix.

COURT OF COMMON PLEAS No. 4.

MATTHIAS PATENT

vs.

THE PHILADELPHIA AND READING RAILROAD COMPANY.

In construing Article XVI, Section 8, of the Constitution of Pennsylvania, there is no distinction to be made between municipal and other corporations; they are alike responsible for property, "injured or destroyed," as well as for property "taken."

DEMURRER TO DEFENDANT'S PLEA.

OPINION BY THAYER, P. J., MAY 31, 1884.

The 8th Section of the 16th Article of the Constitution declares that

"municipal and other corporations and individuals invested with the "privilege of taking private property for public use, shall make just "compensation for property taken, injured, or destroyed by the con- "struction or enlargment of their works, highways, or improvements, "which compensation shall be paid or secured before such taking, injury, "or destruction."

There can be no doubt that the object of this provision was to redress a grievance from which the people of this State had long suffered, and for which no adequate remedy had been found in the Constitution of 1838, or that of 1790, in consequence of the strict construction put upon the provisions bearing upon this subject by the Supreme Court, and steadily maintained until the organic law itself was altered by the people. The Constitution of 1790 had declared

"nor shall any man's property be taken or applied to public use without "the consent of his representatives and without just compensation being "made,"

and that

"every man for an *injury* done him on his lands, goods, person, or repu- "tation, shall have remedy by due course of law."

The Constitution of 1838 had retained these provisions, and added another, namely:

"The Legislature shall not invest any corporate body or individua l "with the privilege of taking private property for public use without "requiring such corporation or individual to make compensation to the "owners of said property, or give adequate security therefore before "such property shall be taken."

It is not a little remarkable that in the first case which came before the Court involving the right to compensation for consequential injuries, *The Phila. and Trenton R. R. Co.*, 6 *Wh.*, 25, Chief Justice GIBSON, who delivered the opinion of the Court, seems to have regarded the Constitution of 1838 as having "narrowed the former prohibition to a taking of private property for public use *by a corporation*," whereas it is apparent that the Constitution of 1838 contained not only the new clause last quoted, but in addition thereto all the clauses of the Constitution of 1790 bearing upon the same subject. The Philadelphia and Trenton Railroad Company decided that the word "taken" in the Constitution was to be interpreted literally, that is, that it only extended to an *actual seizure* of property, and that when therefore the

injury, in the language of Chief Justice GIBSON, extended only to a "depreciation of property by decreasing the enjoyment of it," the Constitution afforded no protection. I have spoken of the Philadelphia and Trenton Railroad case as the first adjudication upon the subject, because it must be clear to any person who will carefully consider the case of *The Commonwealth* vs. *Richter*, 1 *Penna. R.*, 467, that although it is cited in the opinion delivered in the Trenton Railroad case, the decision, so far as it related to Richter's claim for damages for the destruction of his spring by the construction of the Pennsylvania Canal, did not rest upon any claim for consquential damages, nor did its denial turn upon any such question. His claim was rejected because the spring was between low and high water mark on the bank of the Susquehanna River, and the State, it was said by HUSTON, J., in the opinion, had never sold any land below high water mark, and therefore it was "ridiculous to talk of a man being deprived of the use of what was never his own." The question of consequential damages does not appear to have been either discussed or determined in that case. The case was exclusively between the State and the claimants, was decided under the Constitution of 1790, and no question arose in regard to corporate rights or responsibility. However, in *The Menongahela Navigation Co.*, vs. *Coons*, 6 *W. & S.*, 101, which arose in 1843, and was decided under the Constitution of 1838, the doctrine laid down in the Philadelphia and Trenton Railroad case was reaffirmed with greater emphasis in a much longer and more elaborate opinion by the same eminent Judge who had delivered the opinion in the latter case, but not, however, without evidences of a plain perception of the injustice arising from the operation of the rule, and a confessed regret at the supposed compulsion put upon the Court by the words of the Constitution, and also not without a vigorous dissent from at least one member of the Court. "It is not enough," said the Chief Justice (after dwelling upon the necessity of giving a literal interpretation to the word "taken" in the Constitution), "to set before us a case

of moral wrong, without showing that we have legal power to redress it." And the injured parties were dismissed with this expression of commiseration for their hard fortune: "The plaintiffs have at least the miserable good luck to know that they have companions in misfortune; would that it were in our power to afford them more solid consolation." Judge HUSTON did not forget in his dissenting opinion to point out the fact that the clause in the Constitution of 1838 relative to the "taking" of private property was not the only clause applicable to the subject in hand, but that the clause which declared that "every man for an *injury* done him in his lands, goods, person or reputation, shall have remedy by due course of law," was entitled to its just weight in the decision of such a question of construction, and was comprehensive enough to include the plaintiff's case. But the doctrine had the sanction of a great name and the support of a vigorous intellect. And for more than thirty years the *Monongahela Navigation Company* vs. *Coons*, and *The Philadelphia and Trenton Railroad* case, with the long train of similar decisions which followed loyally in their wake, were the undeniable law of this State, and a sure panoply of defense for corporattons against all attempts to compel them to render satisfaction for consequential injuries to and destruction of private property.

But this state of things was forever ended by the Constitution of 1874, which cuts up all those cases by the very roots, so that not a shred of them can possibly survive, and proclaims a new rule of right founded in better reason and more equal justice. The Constitution of 1874 expressly declares that compensation shall be made not only for property *taken*, but for property *injured* or destroyed. And the effect of these words in the total abrogation of the former rule has been promptly recognized by the Supreme Court: *City of Reading* vs. *Althouse*, 12 *Norris*, 400; *Pusey* vs. *City of Allegheny*, 2 *Outerbridge*, 522. It was well said by GORDON, J., in the case last cited, that it is now "idle to recur to

decisions, the authority of which, as to all present and future cases, is by this provision annulled."

A new effort is, however, now made on behalf of those bodies to open a way of escape from the plain provisions of the Constitution, and to continue the old immunity from responsibility for consequential injuries. If this can be successfully accomplished, then the purpose of the convention which framed the Constitution will have been rendered alogether futile in this respect, and the people who adopted it will learn with surprise that they have been deluded by a vain pretence of words into supposing that they were to be shielded in future from irresponsible aggressions upon their rights.

It is said in the first place that the Constitution did not intend that this provision should apply to existing corporations, but upon what ground this is alleged it is hard to understand. The language of the provision is, " municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation," etc. " Invested " means now invested. It does not say corporations which shall hereafter be invested. The language used imports a reference to all corporations invested with this power, whether now constituted or hereafter to be constituted. There is not a word in the Section which furnishes the least foundation for an implication that only future corporations were to be subject to this provision. The Constitution took effect on the 1st of January, 1874, and all its provisions were to be enforced after that date unless otherwise expressly provided in the instrument itself. All consequential injuries suffered at the hands of corporations after the Constitution should go into effect, were, therefore, clearly intended to be embraced in this provision. It is an extravagant assumption, unsupported by any sound reason to say that the Constitution intended that all existing corporations should continue to the end of time to inflict injuries for which the people could have no redress, and that only corporations thereafter chartered should be amenable to this just and wholesome provision. To say

this is to say that the framers of the Constitution intended to perpetuate the old injustice, the old exemption from responsibility, and the old evils which it was supposed to be the purpose of this clause to prevent. That they intended to protect the people against the injurious acts of future corporations, but to leave them forever at the mercy of the old ones. No warrant for such an assertion can be found in the Constitution or elsewhere and I will spend no more time in the refutation of a proposition so clearly untenable.

But again, it is argued that if the provision in question was intended to apply to existing corporations which have not accepted the provisions of the Constitution of 1874, it is a provision which impairs the obligations of contracts, and is therefore within the prohibition contained in Article I, Section 10, of the Constitution of the United States. This is in effect saying that because no remedy existed for wrongs of this nature at the time when the State delegated to the defendants its power of eminent domain, and because they might at that time have exercised this power without any possibility of redress for consequential injuries, this amounted to a contract on the part of the State that no Constitution and no laws should ever be adopted or passed by the people of Pennsylvania which should afford a remedy for these wrongs, a contract that the defendants should have a perpetual and irrevocable license to inflict consequential injuries without responsibility for damages. Is it possible that such a power as this exists in our political system, a power to do injustice without the possibility of providing a remedy, even by the construction of the Constitution by the people themselves, and that it exists by an implied contract made by the Legislature with these corporations? Yet this is the power which it is contended all corporations clothed with the right of eminent domain anterior to 1874, and whose charters contain no provisions for requiring satisfaction to be made for consequential injuries, have over the people of this State—a power which it is claimed is backed by Article I, Section 10 of the Constitution of the United States, and guaranteed by the whole power of the Federal Govern-

ment. Such an argument carries the doctrine of the inviolability of corporate rights to an extremity never dreamed of before. The answer to this bold assumption is that the constitutional provision in question impairs the obligation of no contract which the State ever made with the defendants. Their corporate franchises remain unimpaired. The right of eminent domain conferred upon them by the State they still possess in the plenitude of the original grant. The State did not contract with them that the people would never change their Constitution, or that indoing so they would never devise means to compel them to render just compensation for injuries to and destruction of private property inflicted in the exercise of the powers delegated to them.

The only effect of the change in the Constitution is that a remedy is given where none existed before for the assertion of plain natural rights, which always existed, but for the enforcement of which no means were before provided. But such remedial legislation has never been considered as falling within the prohibition of the Constitution of the United States, or as being in any just sense an infraction of the compact contained in their charter. We adopt on this subject without reservation the opinion so ably expressed by Judge HARE in the case of *Duncan* vs. *The Penna. R. R. Co., 13 Norris, 435, 7 W. N. C., 566.* The illustration put by that learned and distinguished Judge is precisely in point and admits of no answer.

"A child was entitled to support from the father at common law, "but could not recover damages for the frustration of this right through "the parent's death from injuries occasioned by the negligence of an "individual or body corporate. The Act which now affords a remedy "for such deprivations, and under which damages are constantly "assessed and judgments rendered, is of recent origin and was passed "since the creation of the Pennsylvania Railroad Company, and yet it "has never, that I am aware of, been contended that it was invalid as to "pre-existing corporations or impaired their chartered privileges. In "like manner the citizen has a natural right to compensation for the "consequences of acts done for the public benefit that are injurious to "his estate or person, and a statute which affords a remedy can not "justly be assailed as unconstitutional. Such an argument would

"obviously be fallacious if advanced on behalf of an individual, and "the principle is the same when the defendant is a corporation."

13 Norris, 435; 7 W. N. C., 566.

None of the cases cited by the defendant's counsel are in conflict with these views. *Hays* vs. *The Commonwealth, 1 Norris, 518*, and *Ahl* vs. *Rhoads, 3 Ib., 319*, were cases which considered the effect of the new Constitution upon charter provisions relating to the internal regulation and administration of pre-existing corporations, and have no bearing upon the present question. *Long's Appeal, 6 Norris, 114*, is an authority against the defendants, and not in their favor. *The Penna. R. R. Co.* vs. *Langdon, 11 Norris, 21*, was ruled upon the ground that Section 21 of Article III of the Constitution did not repeal the Act of 1868, limiting the amount to be recovered in actions against railroad companies and common carriers to $3,000 in case of personal injuries, and $5,000 in case of death, because the words "and such acts now existing are avoided," applied only to the last clause of Section 21, respecting limitations of time within which suits may be brought against corporations, and not to the first clause relating to the amount of damages to be recovered. The decision also proceeded upon the ground that the Act of 1868 contained a provision that "upon the acceptance of the provisions hereof by any carrier or corporation, the same shall become a part of its act of incorporation," and that by virtue of this provision of the Act of 1868, having been formally accepted by the company, had become, in pursuance of the words of the act, an integral part of their charter, just as if it had been written in the charter when it was granted. The first point ruled in *The Penna. R. R.* vs. *Langdon*, in regard to the limitation of the repealing clause of Section 21, of Article III of the Constitution, which I have above referred to, is said to have been overruled by *Hallahan* vs. *The Phila. & Reading R. R.*, a recent case, not yet reported, which I have not seen. However, that may be, it was never an authority for the position that remedies given by the new Constitution against

corporations in general do not apply to corporations chartered prior to the adoption of that Constitution. On the contrary, *Pusey's Appeal, 2 Norris, 67,* and *Bachler's Appeal, 9 Norris, 207,* are express authorities to the contrary, for it was there decided that the last clause of this very Section 8, of Article XVI, which we are now considering, and which constitutes a part of the remedial legislation embraced in the Constitution of 1874, applies to all corporations, whether incorporated before or since the adoption of the Constitution.

Much stress was laid by the defendant's counsel upon the case of *Navigation Company* vs. *Coons, 6 Barr,* 379, decided in 1847, and, of course, under the Constitution of 1838. Consequential damages were there claimed and allowed, because of an Act of Assembly making the Company responsible for such damages, and it was said by the Court that such damages could not have been allowed if the Company had not accepted the benefit of another Act which subjected their charter rights to alteration and control by the Legislature. The reason assigned for this by GIBSON, C. J., in the opinion was, that by the Constitution of 1838 corporations were not liable for consequential injuries where they had not been subjected to such liability by the terms of their charter. In other words, that the Legislature had no constitutional right to impose a liability for consequential injuries, except as a part of the condition of the grant of the franchise. If the liability did not appear in the charter it could not be subsequently imposed, because by the Constitution they were only responsible for an actual taking of the property. The Act would, therefore, be the imposition of a burden not warranted by the Constitution. It is sufficient to say in answer to this citation, that we are not living now under the Constitution of 1838, but under that of 1874, and that the latter, in express terms, requires the defendants to answer for all consequential injuries occasioned by them since its adoption.

It is unnecessary to follow in detail the multitude of cases upon the law of corporations which the diligent investigation of the defendants' able counsel brought to our notice

upon the argument of this case. They have only an incidental bearing upon the subject, do not dispose of the vital point at issue, and present no obstacle to the enforcement of the plain language of the Constitution. It is sufficient to say that after a thorough examination of all the cases, and after weighing carefully every consideration presented on that side of the case, we are of opinion that no valid reason can be assigned for making any distinction between municipal and other corporations in construing Section 8 of Article XVI of the Constitution. With regard to the former, the effect of the Constitution of 1874, in fixing their responsibility for future consequential injuries, must be regarded as finally settled and determined by *The City of Reading* vs. *Althouse*, and *Pusey* vs. *The City of Allegheny*, already cited. The case of the defendants and that of all other private corporations falls within these rulings, for they are alike within the mischief and the remedy, within the reason as well as within the letter of the constitutional provision which makes them alike responsible for property "injured or destroyed," as well as for property "taken."

Upon the other point arising out of the demurrer, namely, the ability of the plaintiff to seek redress in the form of action which he has chosen, an action on the case, we see no reason to doubt that it is the appropriate remedy. Indeed, it would seem to be the only available remedy under the circumstances of the case.

Neither the charter of the company nor any one of its numerous supplements contains any provisions for the assessment of consequential damages. They contemplate only damages where there has been an actual taking of land. There being, therefore, no special remedy provided by law an action on the case is well brought for the injury. This is the most comprehensive of all forms of action known to the common law. While it will lie for all consequential injuries arising *ex delicto*, and it is the appropriate remedy for such injuries, it is also well settled that "where from a given state of facts the law raises a legal obligation to do a particular act,

and there is a breach of that obligation and a consequential damage," this action lies: *1 Ch. Pl., 135.* And it is for this reason that it embraces within its comprehensive signification the action of *assumpsit*, which is classified by all writers upon pleading as a species of action on the case. *Steph. on Pleading, 16; 1 Ch. Pl., 132.* Whenever a statute enacts that an individual shall recover damages for an injury, and is silent as to the form of the remedy, this action may be supported. *10 Co., 75 b., 2 Inst., 486; 2 Salk. 451; 6 Mod. 26; 1 Ch. Pl. 142,* where numerous examples of this are given.

"In such action all that is necessary for the plaintiff to do in his "declaration in order to make a good cause of action is 'to set out the "'facts out of which the legal obligation arises, the obligation itself, the "'breach of it, and damage resulting from that breach.'"

Per LITTLEDALE, J.

5 B. & C., 609; 8 D. & R., 381, s. c.

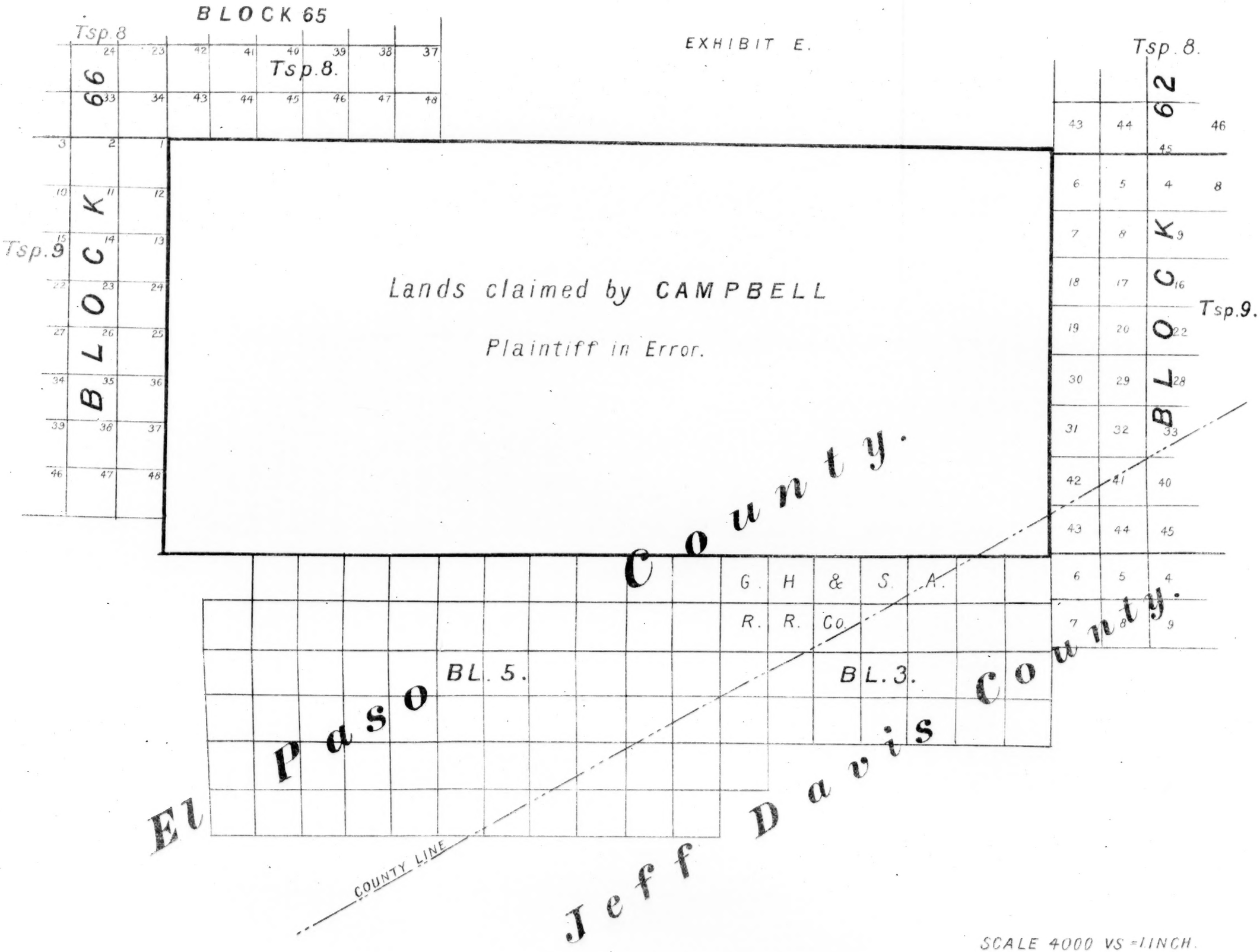
These requisites are contained in the plaintiff's declaration in the present case, which sets out in due order the acts committed by the defendants in pursuance of the franchise with which they were invested by the State, the injury thereby done to the plaintiff's property, the defendants' obligation to make just compensation therefor, their breach of the obligation, and the damage resulting to the plaintiff therefrom. It cannot be doubted that these averments constitute a good declaration in case, or that the form of action selected is the appropriate form for the injury of which the plaintiff complains.

As we are of the opinion that the defendants' plea is substantially bad in not setting forth any facts which constitute a defence to the plaintiff's action, it is unnecessary to consider those points of the plaintiff's demurrer which are directed to the mere formal defects of the plea.

Judgment for the plaintiff on the demurrer.

This judgment was subsequently affirmed by the Supreme Court of Pennsylvania and is reported *17 Weekly Notes of Cases, 198.* Judge THAYER's opinion will be found *14 Weekly Notes of Cases, 545.*

EXHIBIT E.


BLOCK 65
Tsp.8
Tsp.8.
Tsp.8.
Tsp.9
Tsp.9.
Lands claimed by CAMPBELL
Plaintiff in Error.
El Paso County.
Jeff Davis County.
G. H. & S. A. R. R. Co.
BL. 5.
BL. 3.
COUNTY LINE
SCALE 4000 VS = 1 INCH.